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APPENDIX

Supreme Court of The United States

OCTOBER TERM 1970

NO. ~~1252~~ 70-66

RICHARD L. ROUDEBUSH,
Appellant,
-vs-
R. VANCE HARTKE, et al.,
Appellees,

NO. ~~1286~~ 70-67

THEODORE L. SENDAK,
Attorney General of Indiana,
Appellant,
-vs-
R. VANCE HARTKE, et al,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DOCKETED JANUARY 13 AND JANUARY 15, 1971
PROBABLE JURISDICTION POSTPONED TO
HEARING ON THE MERITS, MARCH 22, 1971.

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APPENDIX

Supreme Court of The United States

OCTOBER TERM 1970

NO. 1232

RICHARD L. ROUDEBUSH,
Appellant,

-vs-

R. VANCE HARTKE, et al.,
Appellees,

NO. 1236

THEODORE L. SENDAK,
Attorney General of Indiana,
Appellant,

-vs-

R. VANCE HARTKE, et al,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DOCKETED JANUARY 13 AND JANUARY 15, 1971
PROBABLE JURISDICTION POSTPONED TO
HEARING ON THE MERITS, MARCH 22, 1971.

RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT

December 3, 1970	Complaint filed. Verified Application for Restraining Order filed. Court entered order that Defendant Richard L. Roudebush and all persons acting in his behalf and the defendant members of the recount commission were restrained and enjoined from effectuating a recount for the office of United States Senator for the State of Indiana, in Marion County, Indiana, or elsewhere, pending hearing on Plaintiff's Complaint.
December 11, 1970	Plaintiff filed Amended Complaint.
December 14, 1970	Theodore L. Sendak, Attorney General of the State of Indiana, filed Motion to Intervene.
December 15, 1970	Court granted motion of Theodore L. Sendak, Attorney General, State of Indiana for leave to intervene as party defendant.
December 15, 1970	Theodore L. Sendak, Attorney General filed Motion to Dismiss Complaint.
December 16, 1970	Defendant Roudebush filed Motion to Dismiss and Motion to Vacate Temporary Restraining Order and brief.

December 17, 1970	Hearing held. Three judge court ordered Motions to Dismiss overruled and issued Preliminary Injunction.
December 18, 1970	Notice of Appeal filed by Theodore L. Sendak, Attorney General and Defendants.
December 18, 1970	Petition to Stay Interlocutory Order filed by Theodore L. Sendak, Attorney General.
December 18, 1970	Court overruled Petition to Stay Interlocutory Order.
December 19, 1970	Court filed Opinion on holdings of December 17, 1970 and filed Preliminary Injunction.
December 22, 1970	Defendant Richard L. Roudebush filed Motion to Suspend Injunction pending Appeal to Supreme Court.
December 22, 1970	Court denied Motion to Suspend Injunction.
December 22, 1970	Defendant Roudebush filed Answer to Amended Complaint.
December 23, 1970	Judge Stevens' Dissenting Opinion filed.
April 1, 1971	Certified copy of Order of Supreme Court filed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff for cause of action alleges:

1. This action arises under the Constitution of the United States; the court has jurisdiction pursuant to Title 28, United States Code, Section 1343, subparagraph (3).

2. Plaintiff Vance Hartke was the Democratic candidate for reelection to the office of United States Senator from Indiana at the general election held November 3, 1970; defendant Richard L. Roudebush was the Republican candidate for election to said office at said general election.

3. On November 16, 1970, the Secretary of State of Indiana, pursuant to the provisions of Burns Ind. Stat. Ann. Section 29-5309, certified the returns of said election showing the plaintiff Hartke to have the highest number of votes for the office of United States Senator.

4. On November 17, 1970, defendant Roudebush, purporting to act under and pursuant to the provisions of Burns Ind. Stat. Ann. Sections 29-5401 to 29-5417, filed a petition for recount of the votes cast in said general election for United States Senator in 137 precincts of Marion County, Indiana. Said petition for recount was filed in Superior Court No. 3 of Marion County, Indiana and docketed as Cause No. S 370-1177. A copy of said petition is attached hereto as Exhibit "A".

5. On November 19, 1970, plaintiff Hartke filed in said action a motion to dismiss on the ground that said court lacked jurisdiction over the subject matter of the action; a copy of said motion is attached hereto as Exhibit "B".

6. On December 1, 1970, the Superior Court of Marion County Room No. 3 entered an order overruling plaintiff's motion to dismiss. A copy of said opinion and order is attached hereto as Exhibit "C".

7. Thereafter, on December 1, 1970, said court entered an order for a recount of the votes cast for the office of United States Senator in the general election held November 3, 1970, appointed defendants Samuel J. Walker, John R. Hammond and Duge Butler as a recount commission, and ordered said commission to convene and commence a recount on December 8, 1970. A copy of said order is attached hereto as Exhibit "D".

8. Those provisions of Indiana law contained in Burns Ind. Stat. Ann. Sections 29-5401 to 29-5417, insofar as they purport to authorize and establish a procedure for a recount of the votes for the office of United States Senator, conflict with the provisions of Article I, Section 5 of the Constitution of the United States, which provides that "Each house shall be the judge of the elections, returns, and qualifications of its members . . ."

9. If not restrained and enjoined, defendants Samuel J. Walker, John R. Hammond and Duge Butler, acting under color of state law, will convene and commence a recount of the votes cast for the office of United States Senator in the general election held November 3, 1970 in said precincts of Marion County, thereby depriving plaintiff of the rights, privileges and immunities secured to him by Article I, Section 5, of the Constitution of the United States. If not restrained and enjoined, defendant Roudebush, acting under color of state law as aforesaid, will seek to use and utilize the machinery and procedures provided in said statutes, in pursuing a recount in Marion County and elsewhere in the State of Indiana, and in challenging before the recount commission the determinations of precinct election boards heretofore made as to what ballots should be counted or not counted, as the case may be.

WHEREFORE, plaintiff prays:

1. That a three judge district court be designated, pursuant to the provisions of Title 28, United States Code, Section 2284, to hear and determine this action.

2. That an interlocutory injunction issue from and out of this court, restraining the defendants Samuel J. Walker, John R. Hammond and Duge Butler from convening and commencing a recount and restraining and enjoining Richard L. Roudebush from taking any actions to effect recount procedures under the aforesaid laws of the State of Indiana, pending final determination of this action.

3. That the court determine and declare said laws of the State of Indiana to be unconstitutional insofar as they purport to provide the machinery and procedures by which

a recount of votes in an election for the office of United States Senator shall be conducted; and that the court permanently restrain and enjoin the defendants and restraining and enjoining the defendants Samuel J. Walker, John R. Hammond and Duge Butler from convening and commencing a recount, and the defendant Richard L. Roudebush and all persons acting in his behalf or in concert with him from taking any further action to use said machinery and procedures to carry forward a recount of the vote for the office of United States Senator in the general election of November 3, 1970.

4. For such other and further relief as may be proper.

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Attorneys for Plaintiff

IN THE SUPERIOR COURT OF MARION COUNTY
ROOM NO. 3

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

RICHARD L. ROUDEBUSH, Petitioner	)	
vs.	)	CAUSE NO: S370-1177
R. VANCE HARTKE, Defendant	)	

PETITION FOR RECOUNT OF VOTES AND FOR CONTEST OF ELECTION WITH RECOUNT OF VOTES

I.

Richard L. Roudebush, petitioner in the above entitled cause, after being duly sworn upon his oath, hereby alleges and says:

1. That on the 3rd day of November, 1970, there was held a general election in the State of Indiana in which the public office of Senator in the Senate of the United States was voted upon in all precincts of all Counties of the State of Indiana, including all of the precincts of this County of Marion.

2. That petitioner was a candidate for said state elective office of membership as a Senator in the Senate of the United States at said election.

3. That R. Vance Hartke was the candidate opposing petitioner for said office at said election, and that petitioner and the said R. Vance Hartke were the only candidates for said office at said election.

4. That the post office address of R. Vance Hartke is 850 Dexter Street, Evansville, Indiana, and, that the post office address of petitioner if Rural Route 3, Noblesville, Indiana.

5. That petitioner desires a recount of all of the votes cast for the said office of Senator from and of the State of Indiana in the Senate of the United States at said general election in the Following precincts of this County of Marion, in all of which precincts the said office was voted upon:

1ST WARD; Precincts 5 and 6; 2ND WARD, Precinct 1, 3RD WARD, Precincts 1, 2, 3, 4, 5, 6, 7, 8 and 9; 4TH WARD, Precincts 3, 7 and 8; 5TH WARD, Precincts 1 through 8, all inclusive; 6TH WARD, Precincts 1 through 9, all inclusive; 7TH WARD, Precinct 2; 8TH WARD, Precinct 5; 9TH WARD, Precincts 2, 4, 6 and 7; 10TH WARD, Precincts 1, 6, 10 and 11; 11TH WARD, Precincts 1, 2 and 4; 12TH WARD, Precincts 1, 6, 7 and 8; 13TH WARD, Precincts 2, 3, 5, 6, 8 and 9; 14TH WARD, Precinct 4; 15TH WARD, Precincts 3 and 4; 16TH WARD, Precincts 1, 2, 4, 6, 7, 9 and 10; 17TH WARD, Precincts 2 and 3; 18TH WARD, Precinct 15; 19TH WARD, Precincts 5 and 12; 20TH WARD, Precincts 1, 5, 10 and 11; 22ND WARD, Precincts 2, 4, 6, 10 and 14; 23RD WARD, Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12; 24th WARD, Precincts 5, 6 and 7; 25TH WARD, Precincts 2, 3 and 6; 26TH WARD, Precinct 1; 27TH WARD, Precincts 8, 16, 17 and 18; 28TH WARD, Precincts 5, 10, 11, 17, 18 and 24; 29TH WARD, Precinct 1; 30TH WARD, Precincts 4, 5, 7 and 8; Center Township, outside, Precinct 3; Decatur

Township, Precincts 4, 9 and 12; Franklin Township, Precinct 3; Lawrence Township, Precincts 15, 17, 23 and 24; Perry Township, Precincts 3 and 27; Warren Township, Precincts 3 and 30; Washington Township, Precincts 12, 20, 22, 36 and 37; Wayne Township, Precincts 10, 14, 16, 24, 34 and 35.

6. That the petitioner in good faith believes that either through mistake or fraud the votes cast for such office of said election in the precincts specified in Rhetorical Paragraph 5 of this Petition were not correctly counted and returned.

7. That this petitioner desires to contest said election in respect of said office.

WHEREFORE, petitioner prays that this Court grant this Petition; that this Court approve the petitioner's undertaking with corporate surety filed herewith for the payment of all costs of the recount of votes requested in his petition as sufficient undertaking for the payment of all costs of the recount requested in this Petition; that this Court, upon the expiration of twenty five (25) days after the said general election held on November 3, 1970, order the recount of all votes for said office cast at that election in all precincts in this County of Marion specified in Rhetorical Paragraph 5 of this Petition; that on said date, this Court appoint a commission of three (3) qualified members to make the recount ordered; that this Court order all of the ballots and voting machines used at such election for casting votes for said office impounded and provide for their protection, together with all tally sheets relating thereto, and all voters poll lists used in said Election and all registration records of said precincts containing the names and addresses of all persons registered by Clerk as having voted at said election, and order the same made available to said commission; that this Court order

the said recount commission to make and sign its certificate, upon completion of the recount, showing the total number of votes received by each of said candidates; for said office in said general election in the said precincts, and by what plurality, and file the same with the Clerk of the Marion County Superior Court, and that the said Clerk of such Superior Court thereupon determine the difference if any, from the votes tabulated by the County Canvassing Board, and certify the corrected total vote in this County for said office for each of said candidates to the Secretary of State of Indiana; and that the Court grant all other relief proper in the premises.

/s/ RICHARD L. ROUDEBUSH

Richard L. Roudebush, Petitioner

STATE OF INDIANA)
)
COUNTY OF MARION)

The undersigned, Richard L. Roudebush, having been duly sworn declares and says that he is the petitioner therein and that he has read the above and foregoing Petition, and that the facts alleged therein are true, to the best of his information and belief.

/s/ RICHARD L. ROUDEBUSH

Richard L. Roudebush, Petitioner

Subscribed and sworn to before me this 17th Day of November, 1970.

/s/ JANICE LOUISE SCHUMACKER

Notary Public

My Commission Expires:
October 23, 1973

IN THE SUPERIOR COURT OF MARION COUNTY
ROOM NO. 3

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

RICHARD L. ROUDEBUSH,)
)
Petitioner)
)
vs.) CAUSE NO:
) S370-1177
R. VANCE HARTKE,)
)
Defendant)

MOTION TO DISMISS

The defendant, R. Vance Hartke, by counsel, moves to dismiss the petition of Richard Roudebush, pursuant to TR 12, Indiana Rules of Procedure, for the reason that the court lacks jurisdiction over the subject matter of this action.

Defendant respectfully moves the Court to accelerate hearing on this motion because of the public interest herein.

/s/ JAMES L. TUOHY
Attorney for Defendant
R. Vance Hartke

Dated: November 19, 1970

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I.

STATEMENT OF FACTS

Senator R. Vance Hartke, defendant, was a candidate for re-election to the United States Senate from Indiana at the election held November 3, 1970, and was certified by the Secretary of State on November 16, 1970, as the duly elected candidate. Since that time, the defeated candidate has filed a petition for a recount in this Court, which petition is incorporated by reference.

II.

LEGAL PROPOSITION

The United States Constitution states in part:

> "Each house shall be the judge of the elections, returns and qualifications of its own members . . ."
>
> Article I, Section 5,
> United States Constitution

This provision of the United States Constitution is identical in intent with the Indiana Constitution which reads:

> "Each house, when assembled, shall . . . judge the elections, qualifications and returns of its own members . . ."
>
> —Article 4, Section 10,
> Indiana Constitution

1. *Indiana Law.* The Indiana State Supreme Court has had before it on numerous occasions the question of

whether each house was the judge of its own elections or whether such elections were subject to a recount as provided by statute. The Indiana Court has in all cases held such recount statutes did *not* apply to legislative offices. See *Acker v. Reeves,* 229 Ind. 126, 95 N.E.2d 838 (1951); *Beaman v. Pike County Circuit Court,* 229 Ind. 190, 96 N.E.2d 671 (1951); and *Batchelet v. DeKalb Circuit Court,* 229 N.E.2d 798 (1967).

The Supreme Court in *Acker v. Reeves* used clear language to state that the legal principle of separation of powers that precluded a recount for state legislative offices was equally applicable for elections for the United States Senate and Congress. The Court speaking unanimously through Judge Gilkison said:

> "With respect to contesting the election of a member of the General Assembly the Indiana Constitution provides as follows:
>
> 'Each House, when assembled, shall . . .; judge the elections, qualifications, and returns of its own members; . . .' Art. 4, 10 Indiana Constitution.
>
> Art. 1, 5 United States Constitution is a similar provision for members of the Congress.
>
> In the light of these constitutional provisions this court, speaking by Shake, J. in *Lucas v. McAfee* (1940, 217 Ind. 534, 539, 542, 29 N.E.2d 403, 29 N.E.2d 588, among other things, said:
>
> 'The right of legislative bodies to judge the elections qualifications, and returns of their own members is of ancient origin. The history of the doctrine reveals that it was established in the constitutional law of England in the year of 1586, during the reign of Queen Elizabeth . . .'
>
> 'Provisions guaranteeing this right are to be found in the federal Constitution and in the organic law

> of every state in the Union in language substantially if not identically like that employed in ours. . . . The right is deemed essential to the enactment of legislation without interruption and confusion and to maintain a proper balance of authority where the functions of government are divided between coordinate branches. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread. *Dinan v. Swig* (1916), 223 Mass. 516, 112 N.E. 91."

The above quotation correctly states the deference which all the courts of the state must have for the constitutional provision quoted. See Anno. III, State Legislature, 107 A.L.R. 209."

Our Supreme Court concluded with:

"Sections 324 and 325 (Burns Ind. Stat. Ann. Sec. 29-5401—5402) of this act seem to be an effort on the part of the legislature to grant a right to a recount of the votes for a legislative office. However, the Constitution is the fundamental law of the state. As heretofore noted it expressly grants jurisdiction in this matter with respect to its own members to each house of the General Assembly when assembled. It thereby effectively excludes jurisdiction from the courts." *Ackers v. Reeves,* 229 Ind. 126, 95 N.E.2d 838

Six weeks after the *Acker* decision, Chief Justice Bobbitt, in the Supreme Court Case of *Beaman v. Pike County Circuit Court,* cited above, specifically declared that the statute authorizing a recount (basis of petitioner's action herein) for legislative offices was unconstitutional:

"To the extent that Art. 27, supra, purports to grant to the courts the power to determine the election,

qualifications and returns of members of the Legislature *it is unconstitutional* and of no force and effect." *Beaman v. Pike County Circuit Court,* 96 N.E.2d 671 at 674 (Emphasis added)

The Article 27 referred to by Judge Bobbitt above is Article 27 of the Acts of 1945, Ch. 208 and contains Secs. 324 through 340 of such chapter. In this case Petitioner's petition for recount is brought pursuant to such Article 27 (Burns Indiana Statutes Annotated, Secs. 29-5401—29-5417)(1969 Repl. Vol.))

An Indiana trial court that is without jurisdiction over a recount for a state legislative seat would hardly have jurisdiction over a recount for the office of United States Senator. The relief of petitioner, if any, lies with the United States Senate.

2. *Other jurisdictions.* Other jurisdictions follow the same principles. See:

Laxalt v. Cannon, 397 P.2d 466 (1964), Nevada
McLeod v. Kelly, 7 N.W.2d 240 (1952), Michigan

The *Lexalt* case denied a state contest for the office of United States Senator. A congressional election in Michigan was the subject matter of the *McLeod* case. In both cases, the respective courts held the United States Senate and House were the judges of their members, not the courts.

III.

RELIEF

Wherefore, defendant prays this honorable court grant this motion to dismiss.

Respectfully submitted,

/s/ JAMES L. TUOHY

Attorney for Defendant

Dated: November 19, 1970

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IN THE SUPERIOR COURT OF MARION COUNTY
ROOM NO. 3

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

RICHARD L. ROUDEBUSH, Petitioner	)	
vs.	)	CAUSE NO: S370-1177
R. VANCE HARTKE, Defendant	)	

Opinion, Finding & Ruling on Motion to Dismiss

OPINION

The question raised in the Motion to Dismiss is: Do the Acts of the legislature providing for recount apply to legislative offices? Is the Act, providing for recounts, unconstitutional insofar as they attempt to apply to legislative offices, state or national?

The Act in question presently, and as originally written, provides for "all candidates for any township, town, city, municipality, county, district, judicial, legislative, and state elective office and candidates for membership in the House of Representatives and in the Senate of the United States" (Burns Indiana Statutes, 1969 Replacement, Volume 7 of Part 1, Section 29-5402). The Act further provides that the candidate requiring a recount of votes "shall file a verified petition or petitions therefor, as the case may be, in the Circuit *or in a Superior court* of the

county or counties in which is located or are located the voting precinct or precincts in which he desires a recount of the votes cast for the office for which he or she was a candidate at such election . . ." (Burns Indiana Statutes 1969 Replacement, 29-5403).

The Superior Court, therefore, has jurisdiction of the recount, although it does not have jurisdiction for contest, this being specifically limited to the Circuit Court. (Burns Indiana Statutes, 1969 Supplement, Volume 7, Part 1, 29-5404), and this is an action solely for recount.

Decisions cited in the defendant's brief in support of the Motion to Dismiss principally are *State ex rel Acker vs Reeves, 229 Ind. 126,* 95 N.E.2d, 838, *State ex rel Beaman vs Pike County Circuit Court, 229 Ind. 190,* 96 N.E.2d, 671 (1951) and *State ex rel Batchelet vs Dekalb Circuit Court,* 229 N.E.2d, 798 (1967).

The last named case, State ex rel Batchelet, has a different factual situation in that the Indiana Senate upon convening following the election already had resolved the election dispute in favor of the Senator-elect as, recorded in the Indiana Senate Journal of 1965, and Mr. Batchelet performed the duties of Senator in the 1965 General Assembly. This case is of moment only in that it cites with approval *Acker vs Reeves,* supra.

In the *State ex rel Acker vs Reeves,* supra, this court is aware that Justice Gilkison applied the rather universally recognized principle that legislative bodies have the right to judge the elections, qualifications and returns of their own members.

Justice Gilkison properly observed that the constitution is the supreme law that effectively controls legislatures, congresses, executives and courts of the people. In constru-

ing the Acts of 1945, Chapt. 208, Section 324 and 325, he commented: "Section 324 and 325 of this Act seem to be an effort on the part of the legislature to grant a right to a recount of the votes for a legislative office. However, the Constitution is the fundamental law of this state. As heretofore noted, it expressly grants jurisdiction in this matter with respect to its own members to each house of the General Assembly when assembled. It therefore effectively excludes jurisdiction from the courts". (p. 130)

Of course, this decision is based on the separation of powers between the executive, the judicial and the legislative branches of the government.

The latter case of *State ex rel Beaman vs Circuit Court of Pike County,* supra, had the same question under consideration and arrived at this same general conclusion, citing *State ex rel Acker vs Reeves.*

In disposing of an important second question raised in *State ex rel Beaman*, supra, to wit: that a recount of the votes is not an adjudication of election or rights to an office, but is only a proceeding in discovery, Justice Bobbitt cited the provisions of the statute *then prevailing* in 29-5414 to this effect,

> ". . . When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such pricinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificates in the order-book of such court. *Such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such certifi-*

cates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any contest or other proceeding in which there is an issue as to the votes cast at such election for such office or offices''. pp. 294, 195.

In resolving this question, Justice Bobbitt determined that since the recount certificates *superseded for all purposes* all previous returns, then the result could be a determination by the Circuit Court of the returns of an election of a member of the legislature. This would be in effect in contravention of the separation of powers. It would result in the granting to the courts the power to determine the elections, qualification and returns of members of the legislature, and under these conditions it would be unconstitutional and of no force and effect.

Since the *State ex rel Beaman vs Pike County Circuit Court*, the legislature in 1961 amended the Acts of 1945 to provide as follows: *''Except for the offices of governor, lieutenant-governor, and members of the general assembly,* such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such recount certificates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any contest or other preceeding (proceeding) in which there is an issue as to the votes cast at such election for such office or officers. . . *The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted as herein provided for the purpose of referring the information therein contained to the appropriate authorities.''* Burns Indiana Statutes Volume 7, Part 1, Section 29-5414 at page 202 in said replacement.

This amendment, in the opinion of this court, removes from the superseding part of the statute the offices of governor, lieutenant-governor and members of the General Assembly and was an obvious intent to correct the constitutional defect originally in the 1945 Act, as pointed out in *State ex rel. Beaman vs Pike County Circuit Court*, supra.

It is the considered opinion of this court that the net effect of the '61 amendment effectively retains the right of recount as to the members of the legislature, and this would include the U. S. Senate, and simply is an aid of the powers exclusively granted to the legislature, state or national. It is in aid of, not in derogation of the powers of the legislature, and simply provides information upon which the legislature or Congress can make its own decision as to the qualifications and returns of its members. It, therefore, is not an unconstitutional invasion of their exclusive powers to judge the qualifications and returns of their own members.

The general election of 1970 was held exclusively under and pursuant to the election laws of this state. The state election board thereunder is "vested with the power, and charged with the duty of supervising *all elections and administering the election laws of this state* in their statewide application and especially *as they relate to federal and state elective offices.*" Burns Ind. Stat. Ann. Vol. 7 Part 1 (1969 Suppl), Sec. 29-3004.

Every precinct board, official, county-election boards and every voter participated under and were exclusively controlled by the election laws of this state. The registration of voters, the method of operating the election, the casting and counting of ballots from the opening of the

polls to their closing (and prior thereto in the case of absent voters)—all were under the exclusive provisions of the laws of this state. No other provisions and no Federal Statutes applied.

The office of Senator of the United States was one contested for under these same laws, rules and regulations. Insofar as they do not conflict with the Federal or State Constitutions they are applicable to any question raised as to the conduct and results of the election.

FINDING AND RULING

And, under the reasoning herein, the Court now finds no conflict with the Federal or State Constitutions.

IT IS THEREFORE THE FINDING AND JUDGMENT of this Court that the Motion to Dismiss be and is hereby overruled.

/s/ G. W. FUNK

Judge

IN THE SUPERIOR COURT OF MARION COUNTY
ROOM NO. 3

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

RICHARD L. ROUDEBUSH,)
)
Petitioner)
)
vs.) CAUSE NO:
) S370-1177
R. VANCE HARTKE,)
)
Defendant)

Comes now the Court at 3:00 P.M. E.S.T., December 1, 1970, and following its ruling overruling defendant's motion to dismiss, and being duly advised,

NOW FINDS THAT more than twenty-five (25) days have elapsed since the election involved in this proceeding; that proof of service of notice to the defendant, R. Vance Hartke, has been filed showing service on November 18, 1970; and further finds that no cross-petition or cross-petitions have been filed herein within the time specified by the Statute, and that such petition for the recount of the votes cast for the office of United States Senator in the General Election held November 3, 1970, should be granted, and that a recount of the votes cast for the office of United States Senator in the General Election held November 3, 1970, should be granted, and that a recount of the votes cast for the office of United States Senator in the General Election held November 3, 1970, should be ordered in this cause.

NOW, THEREFORE, IT IS HEREBY ORDERED that the petition for recount of the votes cast for the office of United States Senator in the General Election held November 3, 1970, by the petitioner Richard L. Roudebush against the defendant contestee, R. Vance Hartke, be and the same is hereby granted, and a recount be made of each and all the precincts in Marion County, Indiana, as prayed for in petitioner's petition herein, to-wit :

1st WARD, Precincts 5 and 6; 2nd WARD, Precinct 1; 3rd WARD, Precincts 1, 2, 3, 4, 5, 6, 7, 8 and 9; 4th WARD, Precincts 3, 7 and 8; 5th WARD, Precincts 1 through 8, all inclusive; 6th WARD, Precincts 1 through 9, all inclusive; 7th WARD, Precinct 2; 8th WARD, Precinct 5; 9th WARD, Precincts 2, 4, 6 and 7; 10th WARD, Precincts 1, 6, 10 and 11; 11th WARD, Precincts 1, 2, and 4; 12th WARD, Precincts 1, 6, 7 and 8; 13th WARD, Precincts 2, 3, 5, 6, 8 and 9; 14th WARD, Precinct 4; 15th WARD, Precincts 3 and 4; 16th WARD, Precincts 1, 2, 4, 6, 7, 9 and 10; 17th WARD, Precincts 2 and 3; 18th WARD, Precinct 15; 19th WARD, Precincts 5 and 12; 20th WARD, Precincts 1, 5, 10 and 11; 22nd WARD, Precincts 2, 4, 6, 10 and 14; 23rd WARD, Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12; 24th WARD, Precincts 5, 6 and 7; 25th WARD, Precincts 2, 3 and 6; 26th WARD, Precinct 1; 27th WARD, Precincts 8, 16, 17 and 18; 28th WARD, Precincts 5, 10, 11, 17, 18 and 24; 29th WARD, Precinct 1; 30th WARD, Precincts 4, 5, 7 and 8; Center Township, Outside, Precinct 3, Decatur Township, Precincts 4, 9 and 12; Franklin Township, Precinct 3; Lawrence Township, Precincts 15, 17, 23 and 24; Perry Township, Precincts 3 and 27; Warren Township, Precincts 3 and 30; Washington Township, Precincts 12, 20, 22, 36 and 37; Wayne Township, Precincts 10, 14, 16, 24, 34 and 35.

AND IT IS FURTHER ORDERED that the following Recount Commission be and the same is hereby appointed

to conduct such recount of the votes cast for the office of United States Senator in the General Election held on November 3, 1970, under the jurisdiction and orders of this court:

Samuel J. Walker, a competent mechanic familiar with the voting machines; John R. Hammond, a member of the Republican Party, which cast the highest vote in this state for Secretary of State in the last preceding General Election; and Duge Butler, a member of the Democrat Party, which cast the next highest vote in this state for Secretary of State in the last preceding General Election.

AND IT IS FURTHER ORDERED that on the 8th day of December, 1970, at the hour of 9:00 A.M., the same being no sooner than five (5) days after the date of this order, said Commission so appointed herein shall convene and commence such recount of the votes cast for the office of United States Senator in the General Election held on November 3, 1970, and expeditiously complete the same. Said Commission is to convene and commence the recount at the storage place of said voting machines in Marion County, Indiana, at 2001 Northwestern Avenue, Indianapolis, Indiana, and for absent voters ballots, tally sheets, Canvassing Board returns, and any and all other paraphernalia attendant upon said election and the voting therein at their storage place or places in the City-County Building, Indianapolis, Marion County, Indiana.

/s/ GLEN W. FUNK

JUDGE, Superior Court of Marion County, Indiana, Room #3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE,	)	
	)	
Plaintiff,	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

VERIFIED APPLICATION FOR TEMPORARY RESTRAINING ORDER

David W. Mernitz, being duly sworn, states:

1. Plaintiff Vance Hartke has heretofore filed with the court his complaint for injunctive relief, seeking to restrain the operation and execution of state statutes under which the defendant Richard L. Roudebush has sought to secure a recount of the votes cast for the office of United States Senator at the general election of November 3, 1970, on the ground that such statutes are in conflict with Article I, Section 5, of the Constitution of the United States, which provides that "Each house shall be the judge of the elections, returns, and qualifications of its members . . ."

2. Plaintiff has sought to present this constitutional question to each court in which a recount petition has been filed by defendant Roudebush, by moving to dismiss said petition on the ground that the court lacks jurisdiction

of the subject matter of the action. Such recount petitions have been filed in eleven counties of the state.

3. On December 1, 1970, the judge of Superior Court No. 3 of Marion County overruled plaintiff's motion to dismiss, ordered a recount, appointed defendants Samuel J. Walker, John R. Hammond and Duge Butler as a recount commission, and directed said commission to convene on December 8, 1970 and commence a recount.

4. Under the provisions of Burns Ind. Stat. Ann. Section 29-5403, and under the present circumstances, ninety percent of the costs of a recount involving two or more counties in a state-wide elective office are required to be paid from the general fund of the state. If recount procedures are permitted to go forward in Marion County and elsewhere pending determination of this action, the public at large and the plaintiff will be required to bear expenses which may be totally unnecessary and which cannot be retrieved or recovered.

5. In his petition for recount filed in Marion County by defendant Roudebush, and in public statements by Roudebush and his aides following the election, allegations of fraud have been made in connection with said election. In the order directing a recount, the court has directed the recount commission to convene for said recount "at the storage place for voting machines . . . and [at the storage place] for absent voters ballots, tally sheets, Canvassing Board returns, and any and all other paraphernalia attendant upon said election and the voting therein . . .", notwithstanding the fact that Burns Ind. Stats. Ann. Section 29-5413 provide that the only materials required to be made available to the recount commission are "ballots and voting machines . . . together with all tally

sheets . . . and all lists of the names and addresses of all persons registered by the clerk as having voted" for the contested office. The only purpose served by making "all paraphernalia attendant upon said election and the voting thereon" available to the recount commission is to enable said commission to determine and resolve the aforesaid allegations of fraud. Such attempted determination and resolution of such allegations by the recount commission will usurp the constitutional function of the Senate to be "the judge of the elections, returns, and qualifications of its members" and will lead to violation of the integrity of the ballots, tally sheets, voting machines, Canvassing Board returns and other paraphernalia, the preservation of which is necessary to a proper determination by the Senate of any allegations of fraud which may be properly be presented to it.

6. The plaintiff and other members of the public will therefore be irreparably damaged if the defendants are not restrained pending a hearing.

WHEREFORE, affiant prays on behalf of plaintiff that the defendants Richard L. Roudebush, Samuel J. Walker, John R. Hammond and Duge Butler be temporarily restrained and enjoined from taking any action to effectuate any procedures leading to a recount pending on a hearing on plaintiff's application for an interlocutory injunction.

/s/ DAVID W. MERNITZ

David W. Meritz

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Personally appeared before me David W. Mernitz, who stated that the facts contained in the foregoing Verified Application for Temporary Restraining Order are true to the best of his knowledge, information and belief.

Dated this 3rd day of December, 1970.

/s/ MARILYN J. PARSONS
Notary Public

My Commission Expires:
March 30, 1973

MARILYN J. PARSONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

TEMPORARY RESTRAINING ORDER

The Court having considered the Complaint for Injunctive Relief filed by plaintiff herein, wherein he prays that a three judge district court be designated, and that such court determine and declare the laws of the State of Indiana to be unconstitutional insofar as they purport to provide the machinery and procedures by which a recount of votes in an election for the office of United States Senator shall be conducted, and having further considered the Verified Application for Temporary Restraining Order filed herein, wherein said plaintiff prays that the defendants be temporarily restrained from proceeding to recount the votes cast in, among other places, certain precincts in Marion County, Indiana, during the pendency of this action, now finds that the integrity of the ballots tally sheets, voting machines and other paraphernalia which may be the subject of examination, inspection and handling in connection with the operation of a recount commission, will be compromised, all to plaintiff's irrepa-

rable damage, if a temporary restraining order is not granted. Such finding is based upon the evidence submitted by the verification of David W. Mernitz affixed to the application for temporary restraining order.

IT IS THEREFORE ORDERED that the defendant Richard L. Roudebush, his attorneys, agents, and all persons acting in his behalf or in concert with him, directly or indirectly, and the defendants Samuel J. Walker, John R. Hammond and Duge Butler be, and they are each hereby restrained and enjoined from taking any action whatsoever to effectuate any of the procedures for conducting a recount for the office of United States Senator for the State of Indiana, in Marion County, Indiana, or elsewhere, pending a hearing on plaintiff's complaint.

IT IS FURTHER ORDERED that this order shall be and remain in force until hearing and determination by the full court of plaintiff's petition for an interlocutory injunction.

IT IS FURTHER ORDERED that the United States Marshal serve a copy of this order, and plaintiff's Complaint for Injunctive Relief upon each of said defendants and make his due return hereon.

Dated this 3rd day of December, 1970, at 6:15 o'clock P.M.

/s/ S. HUGH DILLIN

Judge, United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

NOTICE OF HEARING

TO: Richard L. Roudebush
R.R. 3
Noblesville, Indiana 46060
and
Congressional Office Building
Washington, D. C.

John R. Hammond
431 East Hanna Avenue
Indianapolis, Indiana 46227

Samuel J. Walker
2214 North Kenwood Avenue
Indianapolis, Indiana 46208

Duge Butler
156 East Market Street, Room 400
Indianapolis, Indiana 46204

Honorable Edgar D. Whitcomb
Governor, State of Indiana
State House
Indianapolis, Indiana 46204

Honorable Theodore L. Sendak
Attorney General of Indiana
State Office Building
Indianapolis, Indiana 46204

The plaintiff having filed his complaint for injunctive relief and having applied for an interlocutory injunction, you are hereby notified that a hearing on plaintiff's request for an interlocutory injunction will be held at Room 203, United States Court House, Indianapolis, Indiana, on Thursday, December 17, 1970, at 10:00 A.M. before a three-judge district court.

The parties are directed to file with the Clerk on or before 12:00 noon on December 16, 1970, whatever briefs they may desire to file with regard to the application.

The Clerk is ordered to serve copies of this notice the defendants herein by registered mail, return receipt requested. The Clerk is further ordered to serve copies of this notice and the plaintiff's complaint herein upon and Governor and Attorney General of the State of Indiana, by registered mail, return receipt requested.

/s/ S. HUGH DILLIN

S. Hugh Dillin, Judge
United States District Court

Copies to:

John J. Dillon, Suite 711, 120 East Market Street, Indianapolis, Indiana, 46204

David W. Mernitz, 710 Guaranty Building, Indianapolis, Indiana, 46204

James L. Tuohy, 301 Circle Tower Building, Indianapolis, Indiana, 46204

Donald A. Schabel, Room 1120, 111 Monument Circle, Indianapolis, Indiana, 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff for cause of action alleges:

1. This action arises under the Constitution of the United States; the court has jurisdiction pursuant to Title 28, United States Code, Section 1343, subparagraph (3).

2. Plaintiff Vance Hartke was the Democratic candidate for reelection to the office of United States Senator from Indiana at the general election held November 3, 1970; defendant Richard L. Roudebush was the Republican candidate for election to said office at said general election.

3. On November 16, 1970, the Secretary of State of Indiana, pursuant to the provisions of Burns Ind. Stat. Ann. Section 29-5309, certified the returns of said election showing the plaintiff Hartke to have the highest number of votes for the office of United States Senator.

4. On December 3, 1970, the Governor of Indiana issued to plaintiff a certificate of election, pursuant to the provisions of Burns Ind. Stat. Ann. Section 29-5309. On December 4, 1970, the aforesaid certificate was delivered to the Clerk of the United States Senate.

5. On November 17, 1970, defendant Roudebush, purporting to act under and pursuant to the provisions of Burns Ind. Stat. Ann. Sections 29-5401 to 29-5417, filed a petition for recount of the votes cast in said general election for United States Senator in 137 precincts of Marion County, Indiana. Said petition for recount was filed in Superior Court No. 3 of Marion County, Indiana and docketed as Cause No. S 370-1177. A copy of said petition is attached hereto as Exhibit "A".

6. On November 19, 1970, plaintiff Hartke filed in said action a motion to dismiss on the ground that said court lacked jurisdiction over the subject matter of the action; a copy of said motion is attached hereto as Exhibit "B".

7. On December 1, 1970, the Superior Court of Marion County Room No. 3 entered an order overruling plaintiff's motion to dismiss. A copy of said opinion and order is attached hereto as Exhibit "C".

8. Thereafter, on December 1, 1970, said court entered an order for a recount of the votes cast for the office of United States Senator in the general election held November 3, 1970, appointed defendants Samuel Walker, John R. Hammond and Duge Butler as a recount commission, and ordered said commission to convene and commence a recount on December 8, 1970. A copy of said order is attached hereto as Exhibit "D". Defendant Samuel Walker was incorrectly named in said order as Samuel J. Walker, whereas the true and correct name of the said

recount commissioner appointed by the court is Samuel C. Walker.

9. Those provisions of Indiana law contained in Burns Ind. Stat. Ann. Sections 29-5401 to 29-5417, insofar as they purport to authorize and establish a procedure for a recount of the votes for the office of United States Senator, conflict with the provisions of Article I, Section 5 of the Constitution of the United States, which provides that "Each house shall be the judge of the elections, returns, and qualifications of its members . . ."

10. If not restrained and enjoined, defendants Samuel Walker, John R. Hammond and Duge Butler, acting under color of state law, will convene and commence a recount of the votes cast for the office of United States Senator in the general election held November 3, 1970 in said precincts of Marion County, thereby depriving plaintiff of the rights, privileges and immunities secured to him by Article I, Section 5, of the Constitution of the United States. If not restrained and enjoined, defendant Roudebush, acting under color of state law as aforesaid, will seek to use and utilize the machinery and procedures provided in said statutes, in pursuing a recount in Marion County and elsewhere in the State of Indiana, and in challenging before the recount commission the determinations of precinct election boards heretofore made as to what ballots should be counted or not counted, as the case may be.

WHEREFORE, plaintiff prays:

1. That a three judge district court be designated, pursuant to the provisions of Title 28, United States Code, Section 2284, to hear and determine this action.

2. That an interlocutory injunction issue from and out of this court, restraining the defendants Samuel Walker, John R. Hammond and Duge Butler from convening and commencing a recount and restraining and enjoining Richard L. Roudebush from taking any actions to effect recount procedures under the aforesaid laws of the State of Indiana, pending final determination of this action.

3. That the court determine and declare said laws of the State of Indiana to be unconstitutional insofar as they purport to provide the machinery and procedures by which a recount of votes in an election for the office of United States Senator shall be conducted; and that the court permanently restrain and enjoin the defendants and restraining and enjoining the defendants Samuel Walker, John R. Hammond and Duge Butler from convening and commencing a recount, and the defendant Richard L. Roudebush and all persons acting in his behalf or in concert with him for taking any further action to use said machinery and procedures to carry forward a recount of the vote for the office of United States Senator in the general election of November 3, 1970.

4. Alternatively, that the court determine and declare that the State of Indiana has divested itself of whatever authority and jurisdiction it may have possessed with respect to the election of a United States Senator at the general election of November 3, 1970, by virtue of the certifications by the Governor and Secretary of State of Indiana that the plaintiff has been duly elected to that office.

5. Alternatively, that the court construe the provisions of Burns Ind. Stat. Ann., Sections 29-5401 through 29-5417, insofar as they purport to provide machinery and procedures for a recount of the votes for the office of

United States Senator, so as to limit said recount to a physical retabulation of the votes counted by the precinct election boards and recalculation of the totals thereof to correct arithmetical errors only, and to deny any authority to the recount commissioners or the court which appointed them, or any other person, excepting only the United States Senate, to make any further determination whatsoever as to which ballots should be counted, or not counted, as the case may be.

6. For such other and further relief as may be proper.

/s/ JOHN J. DILLON

John J. Dillon
120 East Market Street, Suite 711
Indianapolis, Indiana 46204

/s/ DAVID W. MERNITZ

David W. Mernitz
719 Guaranty Building
Indianapolis, Indiana 46204

James L. Tuohy
301 Circle Tower Building
Indianapolis, Indiana 46204

Attorneys for Plaintiff

NOTE:

For Exhibits A, B, C, D of Amended Complaint, see identical Exhibits A, B, C, and D of first Complaint for Injunctive Relief, included in this Appendix, *supra.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP-70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

MOTION TO INTERVENE

Comes now THEODORE L. SENDAK, Attorney General of the State of Indiana, and moves the Court to intervene as a party defendant, pursuant to T. R. #24 of the Federal Rules of Civil Procedure, and tells the Court:

1. That he is the duly elected Attorney General of the State of Indiana; and,

2. That the Attorney General is given the sole authority under Indiana law to appear and defend the constitutionality of Indiana Statutes, Acts of 1889, Ch. 71, § 4; Acts of 1921, Ch. 85, § 2, the same being Burns' Indiana Statutes 49-1902, and Acts of 1927, Ch. 81, § 11, the same being Burns' 3-1111, and,

3. The above-captioned cause of action has been filed in this Court, seeking an injunction on the basis that the Indiana Re-Count Statute, Acts of 1945, Ch. 208,

§§, 324-330, the same being Burns' Indiana Statute 29-5401, *et seq.*, is unconstitutional in part; and,

4. Federal law recognizes that the State Attorney General is the proper party to appear and defend the constitutionality of state statutes when challenged, in that 28 U.S.C. 2284 (2) requires that "if the action involves the enforcement, operation or execution of state statutes . . ., at least five days notice of the hearing shall be given to the . . . Attorney General of the State."

WHEREFORE, Theodore L. Sendak, as Attorney General of Indiana, prays this Court to make him a party defendant in this action.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

Wendell C. Hamacher
Deputy Attorney General

By: PATRICIA J. GIFFORD

Patricia J. Gifford
Deputy Attorney General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

MOTION TO DISMISS

Theodore L. Sendak, as Attorney General of the State of Indiana, pursuant to Rule 12(B) F.R. Civ. P., moves the Court to dismiss the plaintiff's complaint, upon the following grounds, as such grounds appear in the allegations of the complaint.

I. The Court lacks jurisdiction of the subject matter in that:

1. A federal court is prohibited by statute from interference in a state court action. 28 U.S.C.A. 2283.

2. State courts have exclusive jurisdiction in a recount suit unless provisions of the statute offend the federal constitution.

II. The complaint fails to state a claim against defendants upon which relief can be granted, in that:

1. The plaintiff has an adequate remedy of law;

2. There is no such danger or irreparable danger clear and imminent, great and immediate, as would warrant a Court of Equity in enjoining enforcement of a state statute.

3. The plaintiff has failed to allege irreparable harm to the parties.

WHEREFORE, Theodore L. Sendak, Attorney General of the State of Indiana, prays the Court to dismiss the complaint on the basis of the facts alleged on the face of the complaint, pursuant to Rule 12(B) F.R. Civ. P.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

Wendell C. Hamacher
Deputy Attorney General

By: PATRICIA J. GIFFORD

Patricia L. Gifford
Deputy Attorney General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. Vance Hartke	)	
	)	
vs.	)	No. IP 70-C-694
	)	
Richard L. Roudebush, et al	)	

Entry for December 15, 1970

Honorable S. Hugh Dillin, Judge

This cause comes before the Court upon the motion of Theodore L. Sendak, Attorney General of the State of Indiana, for leave to intervene as a party defendant herein.

The Court having read and considered said motion and being fully advised, now Grants said motion.

Comes now said intervening defendant and files his motion to dismiss this cause of action.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

MOTION TO VACATE TEMPORARY RESTRAINING ORDER.

Defendant Richard L. Roudebush moves the court to vacate the temporary restraining order entered herein without notice to defendant on December 3, 1970, on the ground that it was issued in violation of 28 U.S.C. § 2283.

/s/ JOHN G. TINDER

John G. Tinder
620 Union Federal Building
Indianapolis, Indiana 46204

/s/ DONALD A. SCHABEL

Donald A. Schabel
111 Monument Circle
Indianapolis, Indiana 46204

Attorneys for defendant
Richard L. Roudebush

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

MOTION OF DEFENDANT RICHARD L. ROUDEBUSH TO DISMISS.

Defendant Richard L. Roudebush moves the court as follows:

1. To dismiss the action on the ground that the court lacks jurisdiction over the subject matter for the following reasons:

(a) A court of the United States is expressly prohibited by 28 U.S.C. § 2283 from granting an injunction to stay proceedings in a state court, and this action does not fall within any of the exceptions stated in said § 2283.

(b) Exclusive jurisdiction to determine the effect of the certificate of election issued to plaintiff Hartke and of the recount proceedings commenced by defendant Roudebush under the Indiana Election Code is

vested in the United States Senate by virtue of Article 1, § 5, of the Constitution of the United States.

2. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

/s/ JOHN G. TINDER

John G. Tinder
620 Union Federal Building
Indianapolis, Indiana 46204

/s/ DONALD A. SCHABEL

Donald A. Schabel
111 Monument Circle
Indianapolis, Indiana 46204

Attorneys for defendant
Richard L. Roudebush

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE, Plaintiff,	)	
v.	)	CAUSE NO. IP 70-C-694
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER, Defendants.	)	
THEODORE SENDAK, ATTORNEY GENERAL OF INDIANA, Intervening Defendant.	)	

PRELIMINARY INJUNCTION

This cause was heard before a three-judge District Court convened pursuant to 28 U.S.C. § 2284; on plaintiff's application for a preliminary injunction to enjoin the operation and enforcement of Chapter 54 of Title 29 of the Indiana Election Code, Burns Ind. Stat. Ann. § 29-5401 through § 29-5417, upon the ground that the application and operation of such statutes in respect to an election for the office of United States Senator is unconstitutional.

The Court having heard the evidence, and having considered the briefs and oral arguments of counsel, and it appearing to a majority of the Court after due deliberation that the defendant Richard L. Roudebush has sought

and will continue to seek a recount of the votes cast in certain counties of the State of Indiana in the general election of November 3, 1970, for the office of United States Senator for the State of Indiana, if not enjoined from so doing, and it further appearing that the defendants, Samuel J. Walker, John R. Hammond, and Duge Butler will proceed to recount the votes cast for said office at said election in certain precincts of Marion County, Indiana, if not so enjoined; and a majority of the Court having made and filed its written opinion holding said statute to be unconstitutional with respect to such office, and finding that for said defendants to proceed with a purported recount in Marion County, Indiana, or elsewhere, would work irreparable injury to the plaintiff in that such action would compromise the integrity of the ballots, tally sheets, voting machines, and other paraphernalia of the election upon which plaintiff must rely to justify his certification of election to such office, in the event the defendant Richard L. Roudebush contests the same before the United States Senate, as he threatens to do, it is therefore

ORDERED, that the defendants Richard L. Roudebush, Samuel J. Walker, John R. Hammond, Duge Butler and their officers, agents, servants, employees and attorneys and all those in active concert or participation with them, be and they are each hereby restrained and enjoined from taking any action whatsoever under and pursuant to the provisions of Burns Ind. Stat. Ann. § 29-5401 through § 29-5417 to conduct a recount for the office of United States Senator for the State of Indiana in Marion County, Indiana, or elsewhere, pending the determination of this action; provided, that plaintiff first give security in the sum of $5,000.00 for the payment of such costs and

damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, such bond to be approved by the court or by the Clerk of the court;

IT IS FURTHER ORDERED, that the United States Marshal serve a copy of this preliminary injunction upon each of said defendants and make his due return hereon.

Dated this 19th day of December, 1970, but effective as of December 17, 1970, at 5:45 P.M., pursuant to the oral announcement of the court's decision and order at the conclusion of the hearing on the prayer for a preliminary injunction.

/s/ WILLIAM E. STECKLER
William E. Steckler

/s/ S. HUGH DILLIN
S. Hugh Dillin
Judges, United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO:
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	
	)	
THEODORE SENDAK, ATTORNEY GENERAL OF INDIANA,	)	
	)	
Intervening Defendant.	)	

OPINION

This cause was heard before a three-judge District Court convened pursuant to 28 U.S.C. §2284, on plaintiff's application for a preliminary injunction to enjoin the operation and enforcement of Chapter 54 of Title 29 of the Indiana Election Code, Burns Ind. Stat. Ann. § 29-5401 through §29-5417, upon the ground that the application and operation of such statutes in respect to an election for the office of United States Senator is unconstitutional.

At the general election of November 3, 1970, the plaintiff, Vance Hartke, an incumbent United States Senator for Indiana, and the defendant Richard L. Roudebush were opposing candidates for Hartke's office. The canvass reflected that Hartke received the highest number of votes

cast for such office, and on November 16, 1970, the Secretary of State certified him to the Governor of Indiana as duly elected and the Governor, on December 3, 1970, gave to said candidate a certificate of his election, in the form required by Burns Ind. Stat. Ann. § 29-5309.[1] The certificate has been filed with the Secretary of the United States Senate.

On November 17, 1970, defendant Roudebush filed in the Superior Court of Marion County, Indiana, a petition for a recount of the votes cast in selected precincts of Marion County, stating in said petition his desire to contest said election. This court knows judicially that similar petitions were filed by him in ten other counties of the State of Indiana. The Superior Court of Marion County overruled a motion to dismiss the petition, and proceeded to appoint the defendants Samuel J. Walker, John R. Hammond and Duge Butler as a recount commission to recount the votes cast for the office of United States Senator in such selected precinct of Marion County, relying upon the Indiana recount statute, Burns Ind. Stat.

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1 Section 29-5309. "The secretary of state as soon as he shall receive such certified statements, shall compare and estimate the votes given for United States senator and for representative in congress, and certify to the governor the persons having the highest number of votes as duly elected; and the governor shall give to each of the persons returned to him as aforesaid a certificate of his election, sealed with the seal, and attested by the secretary of state: Provided, That no return of any county which has come into its hands, and which has been duly authenticated by the clerk of the circuit court thereof, under seal, as hereinbefore provided shall be rejected by said secretary of state, but he shall estimate, aggregate and tabulate, and report to the governor the total number of votes cast in each county for each candidate for state office, supreme judge or other officer to be elected by all the voters of the state, and members of congress as evidenced by the face of such returns so certified to him."

Ann. §§ 29-5401—29-5417, the pertinent parts which are set out below.[2] Said recount was ordered to be commenced on December 8, 1970.

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2 Section 29-5401. "Any candidate for any public office voted upon at any election held within the state of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the conditions and in the manner and with the effect as in this article [§§ 29-5401-29-5417] provided."
Section 29-5402. "The right of recount provided in this article [§§ 29-5401—29-5417] shall be available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipal, county, district, judicial, legislative, and state elective office and candidates for membership in the house of representatives and in the senate of the United States; and such right of recount may by any candidate be exercised with respect to one [1] or several or all of the voting precincts in which votes were cast for the office for which he was a candidate."
Section 29-5405. "Each such petition shall state the office and the precinct or precincts within the county in respect of which the petitioner desires a recount; . . . that the petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that the petitioner desires to contest said election in respect of said office, . . . and that he desires a recount of all of the votes cast for such office in such precinct or precincts. The term 'contest' as used in this section shall include all forms of contest herein or hereafter recognized as appropriate means for contesting title to a public office. . . ."
Section 29-5409. "Upon the filing of such petition and undertaking, the court or the judge thereof in vacation shall, upon the expiration of twenty-five [25] days after such election and upon proof of service of said notice or notices, grant such petition and cross-petition or cross-petitions as may have been filed and order the recount of such votes in such precinct or precincts . . . ."
Section 29-5414. "When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state

On December 3, 1970, plaintiff Hartke brought this action to enjoin the defendant recount commission from proceeding with the recount in Marion County, and to enjoin the defendant Rondebush generally from taking further action to obtain a recount in the other counties in which his recount petitions were filed. Jurisdiction was predicated on 28 U.S.C. § 1343(3), with request that a three-judge district court be convened to hear the case, pursuant to 28 U.S.C. §2284. The jurisdiction of a three-

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therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court.

"(Except for the offices of governor, lieutenant-governor, and members of the general assembly,) such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; . . ."

Section 29-5415. "If a recount is had in respect to an office for which votes were cast in all voting precincts of the state, (except governor and lieutenant-governor,) or in more than one [1] county, (except members of the general assembly,) the clerk of the circuit court where such recount was had shall determine whether the votes cast as shown by such recount certificates differ from the votes in such precinct or precincts as the same had been returned to, and tabulated by the county canvassing board, and if he finds there is such difference he shall make his certificate showing the total vote in such county for such office for each candidate as corrected in accordance with the votes shown by such recount certificate and shall forthwith transmit the same to the secretary of state . . . and if the secretary of state shall previously have included in his tabulations votes cast for such office as returned by such county canvassing board he shall correct such tabulation, . . . and the candidate shown by such corrected tabultion to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office."

Note: Portions in ( ) added by 1961 Amendment, as discussed *infra*.

judge court over an action in which a candidate for the Congress of the United States alleges the deprivation of a right under color of a state election law, and the unconstitutionality of such law in the light of the Constitution of the United States has been recognized. Voltaggio v. Caputo, D. N.J., 1963, 210 F.Supp. 337, app. dis., 371 U.S. 232, 83 S.Ct. 325, 9 L.Ed.2d 494. See also Socialist Labor Party v. Rhodes, S.D. Ohio, 1968, 290 F.Supp. 983, aff'd as modified, *sub nom.* Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24. This court was properly convened, and has jurisdiction in the premises.

The attorney General of Indiana has been permitted to intervene, pursuant to 28 U.S.C. § 2284(2), and has filed a motion to dismiss the action. The defendant Roudebush has likewise moved to dismiss. An argument common to both motions is that this court lacks jurisdiction to grant injunctive relief, as prayed for, because prohibited by 28 U.S.C. §2283.[3]

The statute referred to has been characterized as ambiguous, by the Supreme Court of the United States, speaking without dissent. Leiter Minerals, Inc. v. United States, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267. It is therefore not surprising that various, and to some extent contradictory, interpretations of it have been made. One view, which we find persuasive, is that Section 2283 is not a jurisdictional statute, but is rather, in essence, a statutory adoption of the doctrine of comity and hence discretionary in its application. In spite of its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances

3 "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

justify such relief. Baines v. City of Danville, 4 Cir., 1964, 337 F.2d 579, 593. This appears to be particularly true with respect to cases arising pursuant to 42 U.S.C. §1983, as to which 28 U.S.C. § 1343, under which this suit is brought, is the jurisdictional analogue. Machesky v. Bizzell, 5 Cir., 1969, 414 F.2d 283; Carmichael v. Allen, N.D. Ga., 1967, 267 F.Supp. 985 (three-judge court); Landry v. Daley, N.D. Ill., 1968, 288 F.Supp. 194, 233. See Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22.

Another ground for dismissal urged by the defendant Roudebush is that this court lacks jurisdiction because exclusive jurisdiction to determine the effect of the recount proceedings commenced by him is in the United States Senate by virtue of Article 1, Section 5 of the Constitution of the United States, which provides "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ." But a right claimed under the same Constitutional provision—the right to have the returns of the November 3 election judged by the Senate and not piecemeal by various commissions appointed by various state courts—is the very right which plaintiff asserts is being violated by the defendant Roudebush's state court actions. Regardless of the position taken, all parties agree as to the supremacy of the Senate itself to make the final determination as to the winner of the recent election Reed v. County Commissioners, 277 U.S. 376, 48 S.Ct. 531, 72 L.Ed. 924; Barry v. U. S. ex rel Cunningham, 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867.

The great weight of authority supports plaintiff's position that court proceedings for *recount or contest* with regard to an election for representative in the national House of Representatives or for United States Senator are unconstitutional, as in conflict with Article 1, Section

5, whether brought in state or federal court. State ex rel Fleming v. Craford, 1891, 28 Fla. 441, 10 So. 118; Burchell v. State Board of Election Commissioners, 1934, 252 Ky. 823, 68 S.W.2d 427; Opinion of the Justices, 1956, 152 Me. 212, 142 A.2d 532; Belknap v. Board of Canvassers, 1893, 94 Mich. 516, 54 N.W. 376; McLeod v. Kelly, 1942, 304 Mich. 120, 7 N.W.2d 240; State ex rel 25 Voters v. Selvig, 1927, 170 Minn. 406, 212 N.W. 604, Odegard v. Olson, 1963, 264 Minn. 439, 119 N.W.2d 717; State ex rel McCue v. Blaisdell, 1908, 18 N.D. 55, 118 N.W. 141; Laxalt v. Cannon, 1964, 80 Nev. 588, 397 P.2d 466; Opinion of Justices, 1921, 80 N.H. 595, 113 A. 293; Smith v. Polk, 1939, 135 Ohio St. 70, 19 N.E.2d 281; Sutherland v. Miller, 1917, 79 W.Va. 796, 91 S.E. 993; State ex rel Wettengel v. Zimmerman, 1946, 249 Wis. 237, 24 N.W.2d 504; Koegh v. Horner, 1934, S.D. Ill., 8 F.Supp. 933; Peterson v. Sears, et al, 1964, N.D. Iowa, 238 F.Supp. 12.

An equally strong body of authority supports the same rule with regard to the lack of jurisdiction in the courts to countenance suits for *recount or contest* with regard to elections of members of the State legislatures. The reasoning is identical and is predicated on provisions of the various state constitutions which copy Article 1, Section 5 of the Constitution of the United States either verbatim or in substance. We deem it unnecessary to burden this opinion with a collection of these many cases, inasmuch as the Supreme Court of Indiana has had occasion to speak three times in the past twenty years on the subject of legislative recounts, attempted under the statute here involved, Burns Ind. Stat. Ann. §§ 29-5401—29-5417, inclusive.

This trilogy consists of the cases of State ex rel. Acker, et al v. Reeves, 1951, 229 Ind. 126, 95 N.E.2d 838, State ex rel Beaman v. Circuit Court of Pike County, et al, 1951,

229 ind. 190, 96 N.E.2d 671, and State ex rel Batchelet v. Dekalb Circuit Court, et al, 1967, 248 Ind. 481, 229 N.E. 2d 798. The provision of the Constitution of Indiana which controlled the cases is Article 4, Section 10, which is virtually identical to Article 1, Section 5 of the Constitution of the United States.[4] In each case, a defeated candidate for the General Assembly of Indiana filed a petition for a recount pursuant to Burns Ind. Stat. Ann. §§29-5401—29-5417, in each case the trial court appointed a recount commission, and in each case the Supreme Court of Indiana issued a writ of prohibition restraining the court from proceeding with the recount on the ground that it was constitutionally impermissible in the light of Article 4, Section 10.

In order to understand *Acker, Beaman,* and *Batchelet,* and, for that matter, our own decision, it is necessary to make plain that the unadorned word "recount" has been taken to mean in Indiana. It will be noted immediately that the statute (Footnote 2) does not specify in what manner the recount shall be conducted; however, we find from the undisputed evidence in the case before us, and in addition know judicially, that by custom, usage and practice recounts in Indiana have been conducted under the statute as follows: (1) with regard to votes registered on voting machines, the machines are inspected by the commission, and the totals checked against the tally sheets and certificates of memoranda as to total votes cast for each office; this operation is purely mechanical and/or mathematical and creates no problems; (2) with regard to votes cast by paper ballot, which includes all of the votes cast in some of the counties of the State of Indiana and

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4 Article 4, Section 10: "Each House, when assembled, shall . . . judge the elections, qualifications and returns of its own members."

a part of the votes cast in all counties of the State, the commission exercises its own judgment, sometimes supplemented by instructions from the court which appoints it, as to which ballots are to be counted and which not counted, and thereby, for all purposes, nullifies and supersedes the judgment of the duly constituted election boards in this regard.

Further, the election laws provide that after tallying the vote, each local election board must place in separate envelopes, clearly marked, all of the ballots which it counted, and all of the ballots which it did not count. Such envelopes are then sealed with wax, to preserve their integrity. The commission necessarily breaks the seals and removes the ballots for the purpose of its recount—or rejudging, as would appear to be more accurate—and reassembles them according to its own determinations, which may well be by 2-1 vote in many instances.

There is no way in which the commission may make a simple mathematical verification of the vote. As illustrative of the problems encountered, a ballot may, under certain circumstances, be valid and countable for one office, but not for another. If counted for any office it is placed in the "counted" envelope; but the commission has no way of knowing how the election board counted it—whether for all offices, or only for some. The main problems, of course, arise with respect to the counting of ballots not absolutely perfect on their face. What is a distinguishing mark. What is the intent of the voter? As the record in the many permissible recount cases, too numerous to cite, all reflect, judgments must constantly be made in determining which ballots to count and which not to count when "recounts" are made under the Indiana recount law.

It was in this context, then, that the Supreme Court of Indiana first confronted the constitutional question as to the jurisdiction of the Indiana courts to appoint recount commissions with respect to an election for a seat in the Indiana House of Representatives. The Court quoted Article 4, Section 10 Indiana Constitution and pointed out its similarity to Article 1, Section 5 United States Constitution. It then quoted with approval from Lucas v. McAfee, 1940, 217 Ind. 534, 29 N.E.2d 403, 29 N.E.2d 588, as follows:

> " 'The right of legislative bodies to judge the elections, qualifications, and returns of their own members is of ancient origin. The history of the doctrine reveals that it was established in the constitutional law of England in the year of 1586, during the reign of Queen Elizabeth . . .
>
> 'Provisions guaranteeing this right are to be found in the federal Constitution and in the organic law of every state in the Union, in language substantially if not identically like that employed in ours. . . . That right is deemed essential to the enactment of legislation without interruption and confusion and to maintain a proper balance of authority where the functions of government are divided between coordinate branches. it is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread. Dinan v. Swig, 1916, 223 Mass. 516, 112 N.E. 91.' "

The Court then went on to hold the statute unconstitutional and void to the extent that it purported to apply to members of the General Assembly, and entered its writ of prohibition accordingly.

Beaman, like *Acker*, arose out of the general election of 1950, and was considered at about the same time by the

same court. Here original suits were brought in two counties to obtain a recount for the office of Joint State Senator and recount commissions were appointed in each county. The judges of the two courts were again prohibited from proceeding with the recounts. On behalf of respondents, as in the case before us, the argument was made that in carrying out the provisions of the recount statute the courts and their commissions were acting simply in a ministerial capacity. The Court pointed out its recent decision in *Acker*, and held that since the recount statute was unconstitutional as applied to recounts for the legislature, it was, to such extent, void ab initio and inoperative from the time of its passage. Therefore, it reasoned, it could not conver any jurisdiction upon any court either for the performance of judicial or ministerial acts, and hence the appointment of recount commissioners was beyond the lawful jurisdiction of the courts involved.

Also, as here, respondents argued that a recount of votes is not an adjudication of the election or rights to an office but is only a proceeding in discovery. The Supreme Court rejected this theory also, pointing out the provisions of Section 29-5414, "*Such recount certificates shall supersede for all purposes all previous returns . . .*" (Supreme Court's emphasis) and of Section 29-5415, ". . . the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election . . . notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office." The Court concluded from such provisions that if the effect of the statute was not an adjudication of the election and returns of members of the legislature it approached so nearly thereto "that it may interfere with the constitutional right of each house

of the Legislature to judge the elections and returns of its members . . . its effect is more than a mere procedure for the discovery of evidence." Unconstitutionality was reaffirmed.

These decisions put the matter at rest for the next several years. However, in 1961 the General Assembly attempted to bring the law into conformity with the Indiana Constitution with respect to the members of the general assembly and certain other state officers. It did so by inserting the language "Except for the offices of governor, lieutenant-governor, and members of the general assembly" where the same presently appear in Section 29-5414 and 29-5415 (set out in ( ), Footnote 2), and by adding certain paragraphs to Section 29-5414 to provide that with respect to the general assembly, the results of the recount would be forwarded to the appropriate presiding officer for information only. It will be noted that all of the language found in *Beaman* to constitute a recount "more than a mere procedure for the discovery of evidence." remained untouched as to recounts for the office of United States Senator.

However, the effort to legitimize recounts for the General Assembly failed. In *Batchelet* a recount for State Senator was attempted in the DeKalb Circuit Court under the amended statute, and the Court appointed a recount commission. The recount was immediately halted by a temporary writ of prohibition issued by the Supreme Court of Indiana. The Senate itself then resolved the dispute, as provided by Article 4, Section 10. In thereafter making the temporary writ permanent, in stead of simply dismissing the proceeding as moot in light of the seating of Senator Batchelet, the Supreme Court again quoted from *Acker:* "(The) right of legislative bodies to judge the election, qualifications, and returns of their own

members is of ancient origin. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread." The lower court was held to have no jurisdiction.

If, as cannot possibly be denied, it is unconstitutional under Indiana law for an Indiana Circuit or Superior Court to conduct a recount for the office of member of the General Assembly, even after the passage of the abortive 1961 amendments, *a fortiori* it is manifestly repugnant to the Constitution of the United States for such a court to attempt to conduct a recount for the office of United States Senator, as to which office such amendments were not even sought to be applied.

We now return to further discussion of the effect, or lack of effect, of 28 U.S.C. § 2283. At the outset, it will be noted that the section contains three specific exceptions which remove the statutory inhibition in certain circumstances (Footnote 3). Obviously, if the suit at hand falls within one of the exceptions, no further discussion is required. It has been urged in recent cases arising under 42 U.S.C. § 1983[5] and brought pursuant to 28 U.S.C. § 1343 that Section 1983 itself furnishes a specific exception applicable to Section 2283, in that it specifically authorizes relief by ". . . suit in equity, or other proper proceeding for redress." Indeed, it has been so held.

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5 Section 1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Cooper v. Hutchinson, 3 Cir., 1950, 184 F.2d 119. In *Dombrowski, supra,* the Supreme Court found decision of thi question unnecessary to its disposition of the case, and therefore declined to resolve it. It likewise specifically declined to resolve the question in Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182. The proposition therefore remains quite viable.

However, it is true that whether one takes the view of the Third Circuit as expressed in *Cooper* that Section 1983 constitutes a specific exception to section 2283, or whether one takes the view we have adopted that notwithstanding Section 2283 a state court proceeding may be enjoined where special circumstances justify such relief, it does not follow that equitable relief will automatically be granted. Indeed, in some of the cases relied upon in support of each of the rules as above stated, refining the scope of Section 2283, injunctive relief was ultimately denied by reason of the application of principles of comity and the abstention doctrine. E.g., Baines v. City of Danville, *supra;* Cooper v. Hutchinson, *supra.*

The question involved here is one of federal constitutional law, and the state statute involved is not of an uncertain nature. Neither is the state statute susceptible of a limiting construction, because it has already been construed three times by the Supreme Court of Indiana and thrice held unconstitutional. In such circumstances the abstention doctrine does not apply. Harman v. Forsenius, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50; Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377; England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440; McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622; City of Chicago v. Atchison, T. & S.F. R. Co., 357 U.S. 77,

78 S.Ct. 1063, 2 L.Ed.2d 1174; Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 65 S.Ct. 152, 89 L.Ed. 101.

Just as the defunct legal posture of the Indiana recount statute makes clear that abstention is not appropriate, the special circumstances disclosed by the facts impel the conclusion that the active interposition of this Court is required. What defendants are threatening to do, and will do if not enjoined, constitutes an interference with the orderly processes of the recent election, and with the Constitutional prerogatives of the United States Senate. The plaintiff, as a candidate for re-election to that body, has a constitutional right to have the *election contest*, if there is to be one, held before the sole tribunal having jurisdiction in the premises, the Senate itself. It is essential to plaintiff's right that the integrity of the ballots cast at such election be preserved, i.e., that they be held in their original envelopes, with the seals intact, and that the integrity of the tally sheets, voting machines, and other paraphernalia of the election likewise be preserved until such time as they may be called for by the Senate, so that no question may arise as to the character of the evidence which the Senate will be called upon to judge. Plaintiff's rights will be irreparably harmed if such evidence is compromised, for which there can be no adequate remedy at law. The harm to be avoided will take place immediately, if not enjoined. Like Humpty Dumpty, the seals on the ballots cannot be put back together again, if once destroyed, hence the frequent reason given for abstention —that all can be made right through state appellate procedures—does not apply.

We surmise that the defendant's argument here would be less heated if, for example, we had before us, instead of a purported recount commission appointed by the Superior Court of Marion County, a purported recount

commission appointed by a Justice of the Peace of Beanblossom Township, Brown County, Indiana, directed by the Justice to open, inspect, and judge anew all of the ballots cast in the whole State for the office of United States Senator. But what would be the difference?

As was said by the Supreme Court of Indiana in *Beaman*, the statute involved was void *ab initio* and conferred no power upon any court to perform either a ministerial or a judicial act thereunder, as to "recounts" for legislative office. Consistently, therefore, there could be no difference at all between the legal standing of the defendant commissioners in this action, and the hypothetical Brown County commissioners. Thus considered, what we are here enjoining is not in any true sense a "proceeding" in a State court, but, more appropriately, a threatened invasion of the sanctity of the ballots by persons acting wholly without legal authority.

The respective motions to dismiss the action are therefore each denied, and a preliminary injunction will issue forthwith, as prayed for by the plaintiff, upon his giving bond as provided in Rule 65(c), F.R.C.P., in the penal sum of $5,000.00.

Dated this 19th day of December, 1970, as of December 17, 1970, at 5:45 P.M., pursuant to the oral announcement of the Court's decision and order at the conclusion of the hearing on the prayer for a preliminary injunction.

/s/ WILLIAM E. STECKLER

William E. Steckler

/s/ S. HUGH DILLIN

S. Hugh Dillin
Judges of the United States
District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO:
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

Stevens, Circuit Judge, dissenting.

Regardless of whether or not we agree with the Indiana trial court's construction of Indiana law (and we should not substitute our interpretation of state law for his), we still must decide whether a federal court should enjoin a recount of votes cast for office of United States Senator pursuant to state election laws. No federal court has ever done so before.

In my opinion the temporary restraining order was improvidently entered on December 3, 1970, and should be vacated. At that time the recount was not scheduled to commence until December 8, 1970. No explanation has been advanced for the failure to seek review in the Indiana Supreme Court, including a stay of the recount if needed to give that Court adequate time to consider all issues, both state and federal, subject to further review, if necessary, by the United States Supreme Court. See *United States ex rel Lawrence v. Woods*, No. 18169, 7th Cir., October 19, 1970 (slip opinion, pp. 4-6). Nor has there been

any suggestion that the Indiana judiciary is not perfectly capable of handling Indiana litigation without assistance or interference from a federal district court. I think this court is prohibited from enjoining the recount by the plain language of 28 U.S.C. Section 2283, and Supreme Court opinions articulating the policy underlying that statute.[1] *Atlantic C.L.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281; *Amalgamated Clothing Workers v. Richmond Bros. Co.*, 348 U.S. 511.

Plaintiff asserts that an injunction should be granted to protect him from a deprivation of his constitutional right ot have the United States Senate act as the sole judge of the Indiana election returns, U.S. Const., Art. I, Section 5. But the proof which he offered does not establish any threatened deprivation of that right. In my opinion the exercise of "judgment" by state election officials at various states of the counting and recounting of ballots does not invade the Senate's power to make the final judgment on the outcome. The evidence establishes without contradiction that the Indiana recount procedures have integrity, that the original ballots and other records are carefully preserved for future study, that an adequate record of what transpires during a recount is maintained, and that any judgment as to whether or not certain categories of ballots (or even individual ballots) should be counted, may be reviewed subsequently by the body having the power finally to resolve an election contest.

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1 I also think it was improper to enter the temporary restraining order without notice five days before the recount was scheduled to commence. In my opinion notice to the opposite party should always be required absent a compelling showing of need and a convincing explanation for the failure to give notice.

Plaintiff has failed to prove that he would suffer irreparable harm if the recount were permitted to proceed. Indeed, it is entirely possible that the recount would show that a Senate contest would be futile, and thereby avoid a protracted controversy which may now be required. Moreover, as a practical matter, I would assume that the work of the Senate would be facilitated, rather than impaired, by the availability of a fairly conducted recount, in addition to the original count, before undertaking its work.[2]

I would vacate the temporary restraining order and dismiss the complaint.

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2 We have not been advised about the Senate procedures for resolving election contests. It is of some interest that the House of Representatives "generally follows State law and the rulings of State courts in resolving election contests, . . ." See H.R. Rep. No. 513, 87th Cong., 1st Sess. 42 (1961). It would seem likely that the Senate would also rely on state practice. Indeed, I would expect the recount procedure, in contrast to making the final judgment in a contest, to be treated as part of the "Manner of holding Elections" covered by Section 4 of Article I. See U.S. Const., Art. I, Sec. 4.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

E. ROBERT SEAVER
Clerk of the Court

December 23, 1970

The Honorable Theodore L. Sendak
Attorney General of Indiana

RE: SENDAK v. HARTKE
October Term, 1970

Dear Sir:

Your application for a stay of preliminary injunction heretofore denied by Mr. Justice Marshall was presented to the Chief Justice, as requested in your telegram of December 22, and it was also denied by him with the following endorsement thereon:

"Denied, 12/23/70

/S/ W.E.B.
Chief Justice"

Very truly yours,

E. ROBERT SEAVER, Clerk

By MICHAEL RODAK, JR.
Michael Rodak, Jr.
Deputy Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

E. ROBERT SEAVER
Clerk of the Court

March 22, 1971

William F. Thompson, Esq.
Assistant Attorney General
of Indiana
219 State House
Indianapolis, Indiana 46204

RE: ROUDEBUSH v. HARTKE, No. 1232
SENDAK v. HARTKE, No. 1236, O.T. 1970

Dear Sir:

The Court today took the following action in the above cases:

> "Further consideration of the question of jurisdiction in these cases is postponed to the hearing of the cases on the merits. The cases are consolidated and a total of one hour is allowed for oral argument."

I enclose a memorandum describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

E. ROBERT SEAVER, Clerk
By HELEN K. LOUGHRAN
(Mrs.) Helen K. Loughran
Assistant Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. IP 70-C-694
	)	
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants,	)	
	)	
THEODORE L. SENDAK, Attorney General of the State of Indiana,	)	
	)	
Intervening Defendant.	)	

Before the
HONORABLE JOHN P. STEVENS
HONORABLE WILLIAM E. STECKLER
HONORABLE S. HUGH DILLIN

OFFICIAL TRANSCRIPT OF THE PROCEEDINGS

DECEMBER 17, 1970

United States Courthouse
Indianapolis, Indiana

Mary A. Whyte
Official Court Reporter

INDEX OF EXHIBITS

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No. 2	—Certification of the Secretary of the Senate of the United States, 12/11/70, as to attached certificate of election, signed by the Governor of Indiana and the Secretary of State of Indiana on 12/3/70	6	8
No. 3	—Petition for Recount of Votes and for Contest of Election with Recount of Votes, filed by Richard L. Roudebush against R. Vance Hartke in the Superior Court of Marion County on 11/17/70, Cause No. S370 1177, certified by the Clerk of Marion County 12/1/70 (Exhibit A to Complaint)	6	8
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE, Plaintiff,	)	
v.	)	CAUSE NO. IP 70-C-694
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER, Defendants.	)	
THEODORE SENDAK, ATTORNEY GENERAL OF INDIANA, Intervening Defendant.	)	

APPEARANCES:

For Plaintiff:

Mr. John J. Dillon
Indianapolis, Indiana

Mr. James L. Tuohy
Indianapolis, Indiana

Mr. David W. Mernitz
Indianapolis, Indiana

Mr. Thomas Downs, of Counsel
Lansing, Michigan

For Defendants: Mr. Donald A. Schabel
Indianapolis, Indiana

Mr. John G. Tinder
Indianapolis, Indiana

For Intervening Defendant: Mr. Wendell Hamacher

Ms. Patricia Gifford
Office of the Attorney General
Indianapolis, Indiana

(Tr. P. 3]

BE IT REMEMBER That on the 17th day of December, 1970, at 10:20 a.m., E.S.T., proceedings were held in the above-entitled cause in the United States District Court for the Southern District of Indiana, Indianapolis Division, at the United States Courthouse, in the City of Indianapolis, Indiana, before the Honorable John P. Stevens, Judge of the United States Court of Appeals for the Seventh Circuit, the Honorable William E. Steckler, Judge of the United States District Court for the Southern District of Indiana, and the Honorable S. Hugh Dillin, Judge of the United States District Court for the Southern District of Indiana, as members of a Three-Judge District Court; that such proceedings were in the words and figures following, to wit:

JUDGE STEVENS: Will you call the case, please.

MR. JAMES TYRE, DEPUTY CLERK: Yes, Your Honor.

Indianapolis 70 Civil 694, R. Vance Hartke, plaintiff, versus Richard L. Roudebush, Samuel J. Walker, John

R. Hammond, and Duge Butler, defendants, and Theodore L. Sendak, Attorney General of the State of Indiana, intervening defendant.

JUDGE STEVENS: Gentlemen, we have before us motion to dismiss the complaint, the motion to vacate the

[Tr. P. 4]

temporary restraining order, the motion of the Attorney General to intervene, which I believe has already been allowed, and the application of the plaintiff—although it is not a paper specifically named this way, in substance is asking, as I understand it, to turn the temporary restraining order into a preliminary injunction.

We discussed briefly the questions of procedure, and the plaintiff has represented to us that the legal argument on the motion to dismiss and the jurisdictional issue might well be affected by the evidence that is proposed to be offered. And, therefore, without indicating any opinion whatsoever on the jurisdictional issue—which, of course, is a threshold question—we have decided, in view of the representation that the testimony would take only about an hour in any event, that we will receive the evidence, including both the exhibits and the oral testimony, without taking the time to have opening statements made ahead of time, but we will just make the record first. After the record is made, we will then hear argument. And we thought that, again as the plaintiff has the burden, we will hear from the plaintiff first on the argument after the evidence is in.

So if counsel for the plaintiff will proceed—and I will appreciate it if when you come up—because I am not as

[Tr. P. 5]

familiar with you gentlemen as Judge Steckler and Judge Dillin are—would you give me your names each time?

MR. DILLON: Yes, sir. I am John Dillon, and I will represent the plaintiff in presenting the exhibits and the testimony. Mr. Mernitz will make the arguments.

The first seven exhibits, Your Honor, are all various and sundry court records which I will offer, and all are under seal of various and sundry persons authorized to certificate documents under either Federal law or the State law and, therefore, admissible on that basis. I would just like to offer these and hand them to the defendant for his examination, if I might, on that basis.

JUDGE STEVENS: Whichever way will expedite it.

MR. DILLON: First I want to offer the certification of the election returns by the Secretary of State of Indiana to the Governor of Indiana, on which is affixed the Seal of the State of Indiana, the Secretary of State's Office.

JUDGE STEVENS: Would you give me the date of the documents each time?

MR. DILLON: Date of the documents?

[Tr. P. 6]

JUDGE STEVENS: Yes, sir.

MR. DILLON: The date of this document is 23 November 1970.

JUDGE STEVENS: Thank you.

MR. DILLON: Plaintiff's Exhibit for identification "Number 2" is the certification of the Secretary of the

Senate of the United States of the certificate of election signed by the Governor of Indiana and certified by the Secretary of State of Indiana and forwarded to the Senate as prescribed in the Constitution of the United States.

JUDGE STEVENS: The date?

MR. DILLON: The date of the document is 3 December 1970. The date of the certification is the 11th day of December 1970.

JUDGE STEVENS: The later certification—is that the Secretary of the Senate?

MR. DILLON: Yes, sir, it is—Secretary of the Senate of the United States.

The next document is the "Petition for Recount of Votes and for Contest of Election with Recount of Votes" filed by plaintiff Richard L. Roudebush against defendant R. Vance Hartke in the Superior Court of Marion County, Cause No. S370 1177, certified by the Clerk of Marion County and dated November 17th of 1970.

[Tr. P. 7]

JUDGE STEVENS: Is that the same as Exhibit A of the complaint?

MR. DILLON: It is, Your Honor.

Exhibit No. 4 for identification is the "Motion to Dismiss" in the same cause, filed by defendant R. Vance Hartke.

JUDGE STEVENS: That is Exhibit B, I take it?

MR. DILLON: It is, yes, sir. Dated November 19, 1970, and certified by the Clerk of Marion County.

Marion County, Your Honor, is the county seat of Indianapolis, Indiana, and the place wherein the Superior Court sits.

Plaintiff's Exhibit 5 for identification is the Opinion and Order of the Court in the same cause, dated December 1, 1970, and certified by the Clerk of the County.

JUDGE STEVENS: And that is Exhibit C.

I sometimes find it helpful to have the cross-references right in the transcript.

MR. DILLON: Yes.

Plaintiff's Exhibit 6 for identification is the Order of the Court ordering the recount, in the same cause, dated December 1, 1970, and certified by the Clerk of Marion County.

Plaintiff's Exhibit No. 7 for identification is a certifi-

[Tr. P. 8]

cation by the Marion County election officials filed with the Secretary of State within the time provided by statute and certified by the Secretary of State of Indiana.

JUDGE STEVENS: Do you have the date there?

MR. DILLON: Yes—I am sorry. November 16, 1970.

JUDGE STEVENS: Thank you.

JUDGE DILLON: I am sorry. I didn't understand what that exhibit is.

MR. DILLON: That is a certification from the Marion County election officials, on provision of the statute, to correct errors in tabulation, which was made in Marion County, and after the official returns were in, certified

to the Secretary of State. He then, in turn, recertified the numbers to the Governor.

JUDGE DILLIN: All right.

MR. DILLON: Plaintiff now offers into evidence plaintiff's exhibits for identification 1 through 7 and offers them as Plaintiff's Exhibits 1 through 7.

JUDGE STEVENS: Is there any objection?

MR. SCHABEL: No objection, Your Hopor.

JUDGE STEVENS: Exhibits 1 through 7 will be received in evidence.

(Plaintiff's Exhibits Nos. 1 to 7, inclusive, were

[Tr. P. 9]

admitted in evidence, which exhibits are as follows:)

(HERE INSERT)

MR. DILLON: Now, Your Honor, we have one witness we would like to call—Mr. James Kelley.

JAMES F. KELLEY, a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION,
QUESTIONS BY MR. DILLON:

1 Q Please state your name to the Court.

A James F. Kelley.

2 Q What is your business or occupation, Mr. Kelley?

A I am an attorney here in the City of Indianapolis.

3 Q Are you a member of this Bar?

A I am, and the Bar of the State of Indiana.

4 Q Where did you receive your training?

A Indiana University, Indianapolis; undergraduate, Indiana University, Bloomington.

5 Q Do you have any connection in an official capacity with the management or the operation of elections in Marion County, Indiana?

A I do.

6 Q What is that position?

[Tr. P. 10]

A I am Vice President of the Marion County Election Board and Vice President of the Canvassing Board for the 1970 General Election.

8 Q Would you just briefly describe your duties to the Court in that capacity.

A The Marion County Election Board is charged, of course, with the responsibilities of conducting the election, all the elections to be held in Marion County, either city or general, and we do so.

There are three members of the Election Board: The County Clerk and one member appointed by each county chairman of the two major political parties.

9 Q And you are appointed by what party chairman, Mr. Kelley?

A The Democrat Party.

10 Q In other words, this is a bipartisan board consisting of one Republican, one Democrat, and the clerk of the county?

A That is correct.

11 Q Now, how long have you been Election Commissioner, Mr. Kelley?

A Since prior to the general—I believe it was prior to the primary election of 1967.

[Tr. P. 11]

12 Q Then how many elections have you actually served as Election Commissioner in?

A Well, let's see. We had two in '67, two in '68, we had a skip-year in '69, and two in '70; so that would be six—counting primary and general, that would be six elections.

13 Q Prior to that did you have any experience with the election process in this county?

A I did. I have served as a precinct election official, as a judge, and precinct board, election board. I have served as a sheriff on precinct election board, as a watcher, as a ward chairman.

14 Q And for how long have you so served?—without specifying each general classification or category. Just give the Court an idea.

A Well, since I came to Indianapolis to go to law school in 1957, I have been actively participating in politics here on the precinct and county level since then.

15 Q Have you been concerned in all of the elections in Marion County in some capacity with reference to the process of election since 1957?

A I don't believe I have missed one. I believe I have been, in some capacity or another, connected with the election procedure.

[Tr. P. 12].

16 Q Now, have you ever been involved in a petition for a recount and contest in an election?

A I have.

17 Q What was that case, if you remember?

A Yes. That was a Patricia A. Montgomery vs. Dwight L. Cottingham. It was a recount for Marion County councilman from the Third Councilmanic district. That was arising out of the general election of 1966.

18 Q What was your position in that?

A I was appointed by the Superior Court Room 6 of Marion County as a Recount Commissioner.

19 Q And did you so act and serve?

A I did.

20 Q Now, calling your attention to the election of 1970, the fall election of 1970, will you generally describe the paraphernalia and materials and the actual voting, modus operandi, on election day in the fall of 1970.

MR. TINDER: If it please the Court, we object to this question because the issues formulated here by the pleadings do not embrace a contest in that sense of an election. The issues here go to whether or not the election-day machinery if extended before the election is complete, by

the election statutes, would give a recount of the

[Tr. P. 13]

tabulation of the vote. This is by no means a contest in the sense that the evidence of any irregularities would be admissible here. And, since that is not within the issues, a generalized question of that kind, which wants him to describe generally actions taking place in the election machinery on the last election day, would be irrelevelant and incompetent and would lead these issues into a Pandora's box far, far astray from their present formulation.

JUDGE STEVENS: Counsel, I think we have a limit of about an hour to this Pandora's box, and I think it might be relevant to paragraph 4.

MR. DILLON: It is, Your Honor.

JUDGE STEVENS: If any colleagues disagree, I will—

(The members of the Court indicated assent.)

WITNESS KELLEY: If I may proceed?

JUDGE STEVENS: Yes, sir.

A In Marion County we vote primarily by voting machine, but we have, of course, an absentee ballot statute, and, therefore, absentee ballots are cast on paper ballots; so that in each precinct

[Tr. P. 14]

we must make provision for not only recording and counting the machine vote which is recorded

on the voting machine but also make provision for the counting and the casting of absentee ballots and the preservation thereof and the delivery back to the Canvassing Board at the close of election day.

In each precinct—there is delivered to each precinct in the morning—or, actually, the inspector picks it up the day before or possibly even as much as the Sunday before—certain supplies which are designed to provide that precinct with the necessary paraphernalia for preserving these ballots and returning them. The machines themselves are delivered some time ahead to the voting place. Of course, the seals are broken—At the close of the voting, the machine is sealed after the tabulation is taken off it. If I might—

21 Q Just go right ahead.

A All right. Well, if I might have that box lying there, I can, I think more easily—

JUDGE STEVENS: If we are going to use something like that, we ought to mark it.

MR. DILLON: It is marked, Your Honor.

[Tr. P. 15]

I have to suffer with a lawyer for a witness, for which I apologize—getting out of my orderly presentation.

22 Q (By Mr. Dillon) I hand you what has been marked for purposes of identification as "Plaintiff's Exhibit 8" and ask you to tell the Court what that is, if you know.

A Yes. This is the box of supplies which is given to each inspector in each precinct on election day.

The election board in each precinct in the State of Indiana is made up of three people: two judges, one of each political faith, and the inspector, who is of the political faith of that party which received the most ballots for the office of Secretary of State in that county in the last general election. So—

23 Q Now, directing your attention to Plaintiff's Exhibit 8 for identification, is that the same type of box of equipment that was sent to each precinct election board on election day in the November 1970 election in Marion County?

A Yes, it is.

24 Q All right. Now, generally describe to the Court what is in that box.

[Tr. P. 16]

A This box—May I open it?

25 Q Yes, go ahead.

JUDGE STEVENS: The contents are in evidence as well as the box. They have been marked?

WITNESS KELLEY: They are all marked.

JUDGE STEVENS: I see.

A This box contains the tally sheets upon which the precinct election board and the clerks— with the assistance of the clerks are to record the tally of the votes as they are counted in the precinct.

It might be helpful if I could describe the handling of the absentee ballots and the handling of the machines separately.

26 Q All right. Let's follow the exhibit. First I call your attention to Exhibit 8-A. Or do you want to start with 8-C?

A I would prefer to.

27 Q All right. I call your attention to Exhibit 8-C, and tell the Court what that is, if you know.

A This is the tally sheet which is used by the precinct election board and the clerks to tally the votes.

Of course, the machines are opened at six o'clock in the morning, and people proceed and

[Tr. P. 17]

come in and they are checked for their registration; they sign the voters' poll list; they go into the machine; they vote, and they leave the precinct polling place.

Sometime during the day the Marion County Election Board delivers into each precinct the absentee ballots, which are indicated that they have been voted and the voters live in that precinct. During the day those ballots are to be opened by the precinct inspector. They come in an envelope with an affidavit on the outside signed by the voter. First he calls the name. If there is a challenge, then a challenge may be made by one of the challengers or one of the other election board members at that time. If there is no challenge, then the clerks record upon the voters'

poll list the name of the individual voting by absentee ballot and mark their initials by that name's signature in the voters' poll list. They also record on the registration records that that voter has voted. At that point the envelope is opened—If there has been no challenge, at that point the envelope is opened and the absentee ballots are removed, but without unfolding them. They should have the seal of the Clerk of the Cir-

[Tr. P. 18]

cuit Court of Marion County on the outside corner of each ballot. At which point both of the clerks on the precinct election board should initial, alongside the seal, each ballot—now, without unfolding the ballots, to preserve the secrecy of an individual's vote. Those ballots should be then placed in a ballot box and kept until the time when all of the paper ballots are counted, so that all of the paper ballots are commingled and it is not easily discernible—unless there has only been one person who voted by paper ballot—how any individual may have voted. At the end of the day or whatever other time they choose—and this is often done at the end of the day—the ballot box is opened. The paper ballots are then counted.

After the closing of the polls, the machine back is opened. This is when the supplies in this box come primarily into use. At this time the tally sheets are removed and the clerks are assigned the task—and the judges and the inspector—of tallying the vote.

Now, you will notice that on Exhibit 8-C, which is the tally sheet, this provides for a place for the recording of the tally for three different machines in each precinct. Each machine is to be

[Tr. P. 19]

recorded—

MR. TUOHY: Excuse me.

(Mr. Tuohy got out extra copies of the instruments.)

WITNESS KELLEY: There is more than one copy of this in each box, and if the Court—

MR. TUOHY: Perhaps at this time it would be in order to introduce exhibit—

JUDGE DILLIN: I think you better make your offer before you go into the contents there in too much detail.

JUDGE STEVENS: Do you wish to offer these in evidence?

MR. DILLON: No, I am not ready to offer them yet, Your Honor.

JUDGE STEVENS: I don't think he should be testifying as to them before they are in evidence. I don't know whether they are going to be part of the record or not.

MR. DILLON: I agree.

28 Q (By Mr. Dillon) Would you call to your attention Mr. Kelley, what's been marked as "Exhibit 8-A".

A I was speaking and identifying the tally sheet which is marked "Exhibit 8-C".

29 Q I understand that. Would you identify Exhibit 8-A.

[Tr. P. 20]

A Exhibit 8-A is a paper bag which is titled "Bag No. 7", which is to contain—at the closing of the polls, all voted absentee ballots are to be placed in this bag, sealed, and returned to the Canvassing Board of Marion County by the inspector or one of the judges.

30 Q Now, I call your attention to what's been marked for identification as "Exhibit 8-B".

A 8-B is another paper bag, which is titled "Bag No. 5". This bag is to contain all the defective absentee ballots, sealed by sealing wax, and returned to the Canvassing Board of Marion County at the close of the polls, by the inspector or a judge or both judges.

31 Q Now, will you call your attention to Exhibit 8-D for identification.

A 8-D is the "Certificate of Memoranda of the Total Votes Cast for All Offices and for or against Constitutional Amendments".

32 Q Now, Mr. Kelley, Exhibit 8 and sub-exhibits 8-A, B, C, and D that you have identified were the actual materials or copies? Are those actual materials used?

A They are the same printing, yes.

33 Q Those are blanks of the same thing that was sent

[Tr. P. 21]

out on election day in the election of 1970 in the fall; is that correct?

A Yes, sir.

MR. DILLON: Now, the plaintiff offers Exhibits 8, A, B, C, and D into evidence.

JUDGE STEVENS: Do you have any voir dire?

MR. SCHABEL: We have no objection.

JUDGE STEVENS: They may be received in evidence.

(Plaintiff's Exhibits Nos. 8 and 8-A, 8-B, 8-C, and 8-D were admitted into evidence, which exhibits are as follows:)

(HERE INSERT)

34 Q Now, Mr. Kelley, we can talk about the exhibits. Let's now move to when this paraphernalia gets to the courthouse from the election board in the precincts. Just briefly tell the Court what the physical processes are when this arrives at the courthouse at the end of the day, of the election in 1970.

JUDGE STEVENS: Could you clarify for me: When you use the term "paraphernalia", are you talking about the counterparts of the Exhibits 8-A to D?

MR. DILLON: Yes, sir. I am trying to elimi-

[Tr. P. 22]

nate all the rest of the stuff in there, which I don't think is material.

JUDGE STEVENS: All right. I just want to be sure I am following you.

A After the tally is completed in each precinct by machine and paper ballot and the Certificates of Memoranda are made out and the paper ballots—

35 Q Who makes out the Certificate of Memoranda?

A The election board. The Certificate of Memoranda is made out and is signed by the inspector and the two judges and attested to by the clerks. The Tally Sheet is attested to by the two clerks.

36 Q Then what happens to it?

A One each of the Tally Sheet and the Certificate of Memoranda are sealed in an envelope. There are many copies of the Certificate of Memoranda and there are many copies of the Tally Sheet. These are all made out, but only one of each is sealed in an envelope. These are the official of the two.

Then all of the paper ballots that are used in that precinct—those that are voted are placed in Bag No. 7, which is Exhibit 8-A, and those which are not voted or found to be defective are placed

[Tr. P. 23]

in Bag No. 5, which is Exhibit 8-B; sealed with sealing wax and returned to the County Board, which is waiting in the City-County Building for these supplies to be returned to them.

37 Q Now, tell the Court what the Canvassing Board is.

A The Canvassing Board is made up of three parties: again, the County Clerk, one Democratic member, one Republican member. The practice for as long as I have been able to find out has always been that the Election Board serves as the Canvassing Board.

And in Marion County we carry on two separate canvasses. We carry on an official canvass and an unofficial canvass. We hire a completely bipartisan crew, of half Democrats and half Republicans, who tally from the official Certificates of Memoranda. Then we hire a group of accountants who tally from the Tally Sheets. Then the two are brought down and laid out on separate sheets and then balanced to be sure there have been no mistakes in addition or any numerical errors of that kind. And then these two sheets are brought into balance, and finally, then, the official is certified to the Secretary of State.

38 Q Now, does the Canvassing Board count those ballots that were in the paper bags you have

[Tr. P. 24]

testified to?

A Absolutely not.

39 Q Where do those paper bags repose?

A Those paper bags, after the Canvassing Board has completed its duties, are turned over to the Clerk of the Circuit Court for safekeeping.

40 Q Where do the voting machines repose?

A The voting machines are picked up by the employees of the Clerk's office. When the voting machines are locked and sealed at the close of election day, the keys are delivered to the Auditor of the County for safekeeping. The machines are sealed, cranked back down, and are picked up by the trucking firm and taken back to the Marion County voting warehouse.

JUDGE DILLIN: What does "cranked down" mean?

WITNESS KELLEY: The machines are devised so they will be at eye level. They have a crank on the side of them, Your Honor, and by turning that crank, it jacks the machine up. When it is cranked down, it lowers the base. It does not affect the vote in any way. In fact, once the voting machine is locked and the seal placed in place, to change the totals on the machine—

[Tr. P. 25]

other than getting into the back and having the mechanic do it—you would have to break the seal on the front of the machine before the totals on the machine could be changed.

41 Q All right. Now, with reference to the absentee ballots which are in the bags that you have testified to, and the exhibits, what reflects the count that the Canvassing Board takes on those ballots? How is that reflected?

A The official Canvassing Board takes that from the Certificate of Memoranda of the Total Votes

Cast, which is a total figure for each precinct. In other words, it states right on Exhibit 8-D, "Copy only, final total from Machine Tally Sheet". In other words, all absentee ballots—all machines would be added into one figure and recorded there. The Tally Sheet—

42 Q Are those figures separated on the Tally Sheet?

A They are, sir.

43 Q How do those figures relate to the bags?

A On the face of the bag there is a statement, Exhibit 8-A or Bag 7, that—blank space—"All voted absent voters' ballots". The number of ballots is marked there on that bag and they are placed therein. On the "defective" bag it says:

[Tr. P. 26]

"This bag contains"—blank—"defective absent voters' ballots".

JUDGE STEVENS: Excuse me. On 7-A, do they just put the number of ballots, or do they show how many voted each way?

WITNESS KELLEY: Your Honor, on the bag it is merely the statement of the number contained in that bag.

44 Q (By Mr. Dillon) In other words, the thrust of the judge's question, that number is in gross—right?

A That number is in gross. And—

45 Q Now, I think we can expedite this if we just answer the questions.

A I am sorry.

46 Q Now, you have stated that in the other bag—you have categorized that as the "defective ballots". What do you mean by "defective"?

A Well, the bag itself provides for four reasons for its rejection, on the face of it.

47 Q What are those reasons?

A I don't believe it is limited to just that, but I will read those four, if I may:

"rejected for some reason or reasons as defined in the Election Law."

[Tr. P. 27]

(2) "were cancelled, because the voter or voters returned his ballot or their ballots to the Inspector of this precinct and did not avail himself or themselves of the privileges of an absent voter." In other words, he thought he was going to be out of town; he went down and voted absentee, and then he showed up at the polls and voted that day—which he may do—so the ballot would be returned as a spoiled vote.

(3) "were unopened, because the voter or voters appeared and voted in person." That sounds a great deal like 2.

(4) "were classed as defective, because it was made to appear by due proof to this Election Board that such elector or electors who had marked and forwarded such ballot or ballots had died."

48 Q Now, Mr. Kelley, referring back to the Cottingham case when you were a commissioner and there was a petition for recount, would you describe to the Court exactly how you proceeded to count the ballots in the bags to reconcile those or to count them with reference to offical tally in that election?

MR. TINDER: We object to the question for

[Tr. p. 28]

the reason it is irrelevant and immaterial what happened in the 1966 case involving a recount of the votes for a county councilman candidate and would be too remote and, secondly, it would be completely unrelated to the issues here, in a request for recount of the United States Senator, what this witness's experience in another case, non-related case would be.

MR. DILLON: The evidence is offered as a predicate for an expert opinion from a man whom I believe we have qualified as an expert in elections. He has superior knowledge to that of a layman.

JUDGE STEVENS: Is he an expert in recounts?

MR. DILLON: Well, I think he is an expert in the running of elections, and I think he has sufficient background and sufficient superior knowledge of how these things are done to reflect to the Court how it would be done. The same type of equipment is down there now. I think he can relate how it has been done and he can render

an opinion, based upon his experience, how it must be done to get back to the same count any time, if the paraphernalia is the same.

[Tr. P. 29]

JUDGE STEVENS: Well, here the evidence is subject to the objection. I am not sure he is qualified as an expert on the basis of one recount, but we will hear the evidence.

JUDGE DILLIN: If it can be shown, or not, that the witness, by virtue of the experience he has related, has knowledge generally as to how recounts have been conducted in this county, I think it would be more apropos.

MR. DILLON: Yes. I thought I had so qualified it, Your Honor. I will.

JUDGE DILLIN: Yes, but you asked about what he did in one specific case.

MR. DILLON: I am offering that only to demonstrate the physical properties. I will later tie up the expertise on it.

JUDGE STEVENS: Why don't you—perhaps it would be helpful to us—ask him what other experience he's had in recounts or familiarity with recounts?

MR. DILLON: All right. Yes, sir.

JUDGE STEVENS: How often do these things happen and so forth.

49 Q Mr. Kelley, in your position as Vice President of the Election Board, what other recounts have

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you had any connection with? And I don't mean as commissioner, but just generally in your time.

A Mr. Dillon, as far as I know, there has never been another recount filed since I have been in Marion County, for Marion County. There are many cases which I have examined, in being involved in these, all describing the procedure that has been used in various recounts. I am familiar with those. I am very familiar with what is necessary to tally votes and what would be necessary to retally votes. Would not be materially—

50 Q Is that based upon your some 13 years; experience working around the polls and working in the courthouse?

A It is.

JUDGE STEVENS: We will hear the evidence without passing on its weight at this time.

MR. DILLON: All right.

51 Q Now; was the paraphernalia that we have talked about here in Exhibits 8 and 8-A through D the same type of paraphernalia that you were faced with in the Cottingham case?

A Exactly.

52 Q All right. How did you proceed to count the

[Tr. P. 31]

absentee ballots in the bags that you have described?—those that were counted and those that

were rejected. Just tell the Court how you did it—not what you did, but procedure.

A To determine the paper—

MR. TINDER: Excuse me. I'd like to record an objection, please, because there has been no proof it was done correctly in the particular case he is now reciting. There has been no basis laid to show this is done correctly or incorrectly in that particular case, as it might affect its particular use in this case; so we object to it as irrelevant, incompetent and immaterial.

JUDGE STEVENS: May I inquire if that was done according to a court order in that prior proceeding?

WITNESS KELLEY: It was, Your Honor.

MR. DILLON: You were under a court order brought under the same statute and the same provisions as the case in question here today; is that not true?

WITNESS KELLEY: It was, yes.

MR. DILLON: I want you to tell the Court how you got to counting the ballots in those bags.

[Tr. P. 32]

Physically, how did you do it?

WITNESS KELLEY: Yes, I understand that.

JUDGE STEVENS: May I be sure? You occupied that position in that recount that one

or more of the defendants would occupy in this case if the recount were to go ahead?

WITNESS KELLY: Yes.

A We opened each of the two bags I have described as "8-A" and "8-B", either containing the defective absent ballots or the voted absent ballots. We looked at each ballot in each bag. Some ballots which had been counted by the precinct election board, we rejected. Some that had been rejected by the precinct election board, we decided were valid ballots and counted them. Then, on that analysis, we made a report to the Court.

53 Q You counted the ballots in the bags that had been rejected as well as the ballots in the bags that had been accepted?

A Yes. There were ballots in the rejected bags from each precinct which we decided had been improperly rejected and we counted them. And there were ballots in the bags that had been reported as counted that we decided were improperly counted, and we refused to count.

[Tr. P. 33]

54 Q What did you do with the count?

A We reported the result of this recount to the Court which had appointed us and which had asked us to do this in these certain precincts.

55 Q In that case, what did the Court do with reference to your figures?

A Then the case was removed to the General Term and the Court—finally ended in Circuit Court,

and the Court looked at all the ballots again; accepted some that we had accepted; rejected some that we had rejected. Completely redid everything we did and completely redecided what ballots should be accepted, what ballots shouldn't be accepted, and again substituted their judgment for that of the precinct election boards.

JUDGE STEVENS: May I interrupt?

MR. DILLON: Yes, sir.

JUDGE STEVENS: Was there a record kept of exactly what you did before you transmitted the results of your work to the Court? In other words, could the Court tell which ballots you had counted that had not been previously counted, and vice versa?

[Tr. P. 34]

WITNESS KELLEY: Yes, sir.

JUDGE STEVENS: The Court could tell what categories of changes you made, and then it could agree or disagree with what you did?

WITNESS KELLEY: Yes, sir. And, in fact, it did disagree.

JUDGE STEVENS: When you got through counting, what envelopes did you restore the ballots to? Did you put them back in the envelopes in which they came?

WITNESS KELLEY: I believe we resorted them into different envelopes.

JUDGE STEVENS: But the Court was able to tell what resorting had been done?

WITNESS KELLEY: Yes, sir. We kept a precinct-by-precinct record of that.

56 Q Directing your attention to the bag which contained the votes which the precinct election board had tallied and counted: Why could you not just take those ballots and make a numerical count as the precinct election board had done?

A Because no matter how much instruction you give the precinct election people, they don't always follow their directions. They're asked to tally the

[Tr. P. 35]

absentee ballots on the Tally Sheet and then record them and then add them in. It is not at all uncommon for them to totally fail to do that. They have two or three absentee ballots, or five, and they have one machine. They just add the two together, write it down. They are eager to go home. They have been there since six o'clock in the morning, and they want to go home and they hurry up and write the total figure down and send it in along with the bag saying they have five absentee ballots. You look on the tally sheet and there is nothing to show how many absentee ballots.

So if you merely go through the Tally Sheets and try to retally, they won't jibe with the number on the bag, you see, and there is no way the public counter—On the Tally Sheet you record the number of votes cast on the machine, but that doesn't even jibe because the machine can break down. The mechanic goes out; has to run a couple of votes on the machine—a voter goes in and fails

to operate the machine properly. And the numbers just do not jibe down the line.

Did I go over that too rapidly?

57 Q No. I want to stick to the paper ballots. Why, then, can't you just take the paper ballots out of the bag, that were counted by the precinct

[Tr. P. 36]

election board, and mathematically or numerically retally those just as the precinct board did?

A That is not always possible, either. If I may give an example: A man votes straight Republican up in the circle on the absentee ballot, paper ballot; but then he decides, down below, to vote for one or two Democrats—decides to vote for Vance Hartke, but yet he's got an X up there. And the precinct election board has decided, by putting it in the valid bag, that it is a valid ballot. There is no way on earth to tell how they recorded that. So unless the Recount Commission makes another judgment as to the validity or non-validity of that ballot, there is not possible way to make a recount without making those judgments.

58 Q Let's just assume that in this particular election that you were a recount commissioner and you opened and you found exactly that situation. Could you not reconcile that with the precinct election board's count?

A No, sir, not if there were a number of people. The main problem you have is that not every voter votes for every office, you see. So, therefore you are assuming that if you knew the total number

[Tr. P. 37]

of people who voted by absentee, then you could figure out how the result was counted by the board in the precinct. That is not true, because you are not sure that every voter who voted—it was properly recorded. There is no way, believe me. I have gone through this and sweated over these things, and it is absolutely impossible to determine, just by looking at the ballots, who counts what.

JUDGE STECKLER: I'd like to ask a question, Mr. Kelley. Did you encounter disagreement among the members of the Recount Commission?

WITNESS KELLEY: Yes, sir. In fact, one of the members refused to sign the determination to the Court.

JUDGE STECKLER: Who would make the determination?

WITNESS KELLEY: A majority vote.

JUDGE STECKLER: You had three members?

WITNESS KELLY: Yes, sir.

JUDGE STECKLER: This was according to party affiliation?

WITNESS KELLEY: I believe that is correct, Your Honor.

JUDGE STECKLER: What is the composition of the Recount Board?

[Tr. P. 38]

WITNESS KELLEY: There is a machine mechanic and a Democrat and a Republican.

59 Q (By Mr. Dillon) Mr. Kelley, let's stay with the paper ballot which you described as being marked in the circle with a straight party vote and then had other markings, individually X'ed for individual votes. Going back to your experience in the precinct, and if you are on the precinct board, as you have been, what is your view of what you would have been required to do at the precinct level with that ballot?

A I believe that the ballot is an invalid ballot, at least as to the Senatorial—I am assuming that is the race—at least as to the Senatorial race. My experience has been that the precinct election boards try very hard to vote as many votes as they can; that they don't want to disqualify anybody's vote, but—

60 Q All right. Let's say you disqualified that ballot in the precinct. What would you do with it?

A The problem being—

61 Q No, no—physically. You disqualified—

A You might disqualify part of it and not all of it.

[Tr. P. 39]

If you disqualify part of it and not all of it, I suppose I would put it in the counted bag. But if I disqualified all of it, I would put it in the disqualified bag.

62 Q And if you counted it in any way, you would put it in the qualified bag?

A That is the judgment I would make, yes.

63 Q All right. And that bag would then go downtown as you stated?

A Yes, sir.

64 Q Now, based upon your experience, when the recount commissioners get to that bag and open it, is there any way, if such ballot was voted, that they could reconcile numerically the numbers between the official Tally Sheet and the absentee ballots in that bag?

A Not if they had a number of absentee ballots. If they only had one absentee ballot—or maybe even two or three, I suppose that would be. But if you had more than that, it would be absolutely impossible.

65 Q Based upon your experience in the precincts that are in contest in Marion County today, is it your opinion that such ballots will exist?

A Yes. And, in fact, I know they have, because I have looked at the vast majority of these bags,

[Tr. P. 40]

the number recorded of votes cast, and looked at the results on the Tally Sheet in the vast majority of these precincts, and they don't tally.

66 Q You are talking about you have looked as a member of the Election Board of Marion County in this election?

A That is correct.

67 Q And you state to the Court—as a matter of fact, not as a matter of opinion—that they do not tally?

A That is right. The Canvassing Board—all in Mr. McClure's office went through. We asked our staff to pull out all of those which did not—apparently had some kind of calculative error or some problem, and we looked at every one of them. And they do exist, yes.

68 Q Now, turning your attention to your experience as a lawyer and having worked in these cases: Have you ever perused any of the Indiana Supreme Court opinions?

A I have.

69 Q In recount cases?

A I have.

70 Q Have you ever noted in those opinions any

[Tr. P. 41]

reproductions of ballots?

A Yes. It is rather common practice to reproduce: the checkmark versus the "X". What is a checkmark; what isn't a checkmark? What is an "X"? What is an estraneous mark? What is an identifying mark? All of these things have been reproduced, and the Supreme Court itself has actually made judgments as to what to accept and what to reject as a ballot.

71 Q Now, based upon all your testimony, based upon your experience, based upon your experience as

an Election Commissioner, and based upon your experience having actually gone through a recount and your thirteen years' experience in elections: is it possible in Marion County, wherein paper ballots are cast in an absentee fashion, for a recount commissioner to open those bags and make a simple arithmetical computation of votes as they were counted by the Election Board?

A Absolutely—

MR. TINDER: If it please Your Honors, we object to this question because, first of all, it calls for expert opinion. We do not believe that the witness has been properly qualified by proof of expert experience to qualify as such in order to

[Tr. P. 42]

answer a question calling for expert testimony. He has recited solely his participation as a recount commissioner in one case involving the election of County Councilman in 1966 as his sole factual basis of what his opinions are, from his general knowledge of how the ballots are registered and preserved in bags after the election. We do not believe a single actual experience is sufficient to qualify him either as a technical or practical expert, an expert in fact, for the purpose of giving expert testimony. Moreover, the Court will recall that, in giving his qualifications, the Court asked him about his examination of court cases. They are in effect calling upon him for a legal opinion, which is really attempting to substitute this witness's opinion—and he is an

admired lawyer in our community, but, nevertheless, this is not the way to make a legal argument to your court. So we submit, Your Honor, they have not qualified this witness, and it is improper.

MR. DILLON: Your Honor, may I be heard on this?

JUDGE STEVENS: Yes.

MR. DILLON: We did not qualify Mr. Kelley

[Tr. P. 43]

on an isolated case. We qualified him on his total experience and his knowledge of the parapheranalia.

The leading case I can find on it is Bridger v. Union Railway Company, 355 F.2d 382, supported by 287 F.2d 255, supported by Section 506 of Moore's Federal Practice, supported by Smith v. Hobart Manufacturing Company, 185 F.Supp. 751.

And here is what these courts have said in this regard. There are two tests regarding expert witnesses. First, is the subject matter not within the common knowledge of the average layman? Second, will the witness have such skill as to make it appear that his opinion would rest on substantial foundation and would aid the tryer of fact?

Now, I say here in this case the tryer of fact, which is Your Honors, could not possibly understand this paraphernalia, because I don't think any of us do until we get down and look at it. Here

is a man who has worked with it for 13 years. He's told you the actual physical condition of the ballots in the courthouse today, and he's told you how he bases his opinion that they cannot be recounted but they must be judged. And this is the essence of our lawsuit. The physical

[Tr. P. 44]

properties and the methods by which recounts are had in Indiana must be judgment calls and, therefore, must be contests and, therefore, must be reserved to the United States Senate.

JUDGE STEVENS: Mr. Dillon, are you arguing your case?

Will the reporter read the question.

(The reporter read the question, as follows: "Now, based upon all your testimony, based upon your experience, based upon your experience as an election commissioner, and based upon your experience having actually gone through a recount and your thirteen years' experience in elections: is it possible in Marion County, wherein paper ballots are cast in an absentee fashion, for a recount commissioner to open those bags and make a simple arithmetical computation of the votes as they were counted by the election board?")

JUDGE STEVENS: Mr. Kelley, let me first ask you: Do you have an opinion as to whether or not it is possible to do that?

WITNESS KELLEY: I do.

JUDGE STEVENS: Would you state your opinion.

WITNESS KELLEY: I do not believe it is possible to recount by—and open the bags without making judgments as to the validity of ballots or non-validity of ballots.

JUDGE STEVENS: And, counsel, we have

[Tr. P. 45]

overruled your objection, as you can tell. We think the objection goes to the weight of the evidence rather than admissibility.

MR. DILLON: You may cross-examine.

CROSS-EXAMINATION,

QUESTIONS BY MR. TINDER:

72 Q Mr. Kelley, do I understand correctly that you have only participated in one recount under the election laws of Indiana?

A That is correct.

73 Q Are you generally familiar with the statutes bearing upon recounts in Indiana?

A Generally, yes, sir.

74 Q Am I correct in stating that they provide, step by step, the duties of the recount commissioners, if they are appointed by a court of jurisdiction?

A I believe that they do provide some guidance, but I think the commissioner—the Recount Commission looks to the Court for its guidance in what it is to do and looks to the order of the Court.

75 Q Isn't it purely statutory?—the procedures to be taken by the recount commissioners?

A The Court orders the appointment of the Recount Commission, and so appoints them. I am not argu-

[Tr. P. 46]

ing with your. I believe it is up to the Court to tell the Recount Commissioners what the Court wants and what precincts are being recounted and how to do it.

76 Q When you say "How to do it", this is what my question now goes to. Does the statute prescribe, step ty step, how the recount commissioners begin, proceed through, and render a result on the recount?

A Yes, sir, I believe it does.

77 Q Now, Mr. Kelley, did you serve willingly on the board—the Recount Commission appointed in 1966 to which you refer?

A Not really.

78 Q You were an involuntary member, so to speak, then?

A It took a great deal of time, and time which I could not afford, and I was not paid for it.

79 Q And, as a result, you feel a little prejudiced to the system, then?

A I don't feel prejudiced either way.

80 Q I see. Now, you have recited to the Court how the records are made by the precinct election board and then transmitted to the City-County

Building, where they are to be totalled by both an unofficial and official canvassing board under the supervision of the Marion County Election Board, of which you are a member; am I correct?

[Tr. P. 47]

A Yes—with one correction. Under the supervision of the Marion County Canvassing Board. The Canvassing Board actually runs the canvass.

81 Q You are a member of that board?

A I am, sir.

82 Q I believe you stated that mistakes are made in the precincts by the election officials, like the inspector and the clerks?

A Yes, sir.

83 Q And I believe you said that there had been frequent mistakes made in the tallies sent in on the report which is signed by the officials of the precinct election boards. Am I correct?

A If you mean mistakes in the total number of votes reported, I don't know about that. I know that there have been mistakes as to the method by which the vote is reported. They are instructed to do certain things, and there have been mistakes as to how they have done those things. Those are the mistakes I speak of.

84 Q Has your experience shown you that these mistakes made by precinct boards or members thereof result in wrongful totals on their total sheets that they send in certified to by two clerks of the precinct?

[Tr. P. 48]

A Two ways. One, as to machines, the experience we had in recounting where I was recount commissioner, there was no mistake on any of the machines—not one vote difference on the machine reports. But as to paper ballots, there are differences of opinion of what should be counted and what should not be counted. And if you call that a mistake, then I guess that is a mistake.

85 Q Have you found that very frequently they were improperly marked?

A The ballots?

86 Q Yes, sir.

A Yes, sir.

87 Q Paper ballots?

A Yes, sir.

88 Q Do you consider in your experience that the proper total of these absentee paper ballots, along with the checking of the results on the machine. is precisely the method which was the object of the legislative intent in the present recount statutes of Indiana?

MR. DILLON: Objection. The legislative intent would be a question of law.

[Tr. P. 49]

JUDGE STEVENS: May I hear the question?

(The reporter read the last preceding question.)

JUDGE STEVENS: We will overrule the objection.

A I wasn't a member of the Legislature. I really don't know what the Legislature intended. I can only tell you what's been done in the past, what the practice has been—

89 Q Tell us—

A (Continuing)—and what would be necessary to do the job.

90 Q Are you saying that the recount commissioners do recheck these absentee ballots if they do their job under the statute?

A I am saying that to recount you would have to open the bags, open the ballots, look at them and make judgments about their validity, yes, sir.

91 Q Isn't that what the present recount statutes provide as a part of the steps for the recount?

A I believe—I really would like to see the statute you are referring to. I am sorry.

MR. DILLON: May I show it to him, Mr. Tinder?

MR. TINDER: Certainly.

[Tr. P. 50]

A Well, sir, I don't believe that is that clear. There is a question in my mind. It would be possible to have a recount which would be a retabulation of the Tally Sheets, which would be a strictly numerical thing, without ever looking at the ballots or opening the bags—in other words, going

through and making sure the Canvassing Board did its job properly and did report what was on the precinct Tally Sheets. It would be possible to recount on that basis.

JUDGE STEVENS: Mr. Kelley, which procedure did you follow?

WITNESS KELLEY: We used the judgment procedure.

JUDGE STEVENS: You thought that was in accordance with the statute?

WITNESS KELLEY: We were instructed by the Court to do that, yes, Your Honor.

92 Q The spelled-out provision of the recount statute under which you have testified as an expert—does it provide that the recount is of the precinct count made by the board in the individual precinct?

A Yes, sir. And I think that could be read to just looking at this. (Witness indicated instrument.)

[Tr. P. 51]

93 Q I will ask you if you had experiences where they simply didn't count correctly on these absentee ballots, as well as counting ballots which should not have been counted?

A As I say, it is hard to tell. When you look at the absentee ballots, it is not always clear as to whether they have been counted or not. That is not clear. And I don't know whether to call that a mistake or not.

94 Q At least, they are not tallied correctly; am I correct?

A I don't know whether they are tallied correctly or not, because I don't know what judgments the precinct election board made.

95 Q And your answer would apply to all—How many precincts are there in Marion County in this last election?

A Approximately six hundred.

96 Q Would your opinion be the same as to whether there might or might not be mistakes on the tallies in the votes on the last election on any office of the United States Senate?

A Again, if you mean mistakes as to what ballots are judged valid and what are not?

97 Q Yes, sir.

[Tr. P. 52]

A (Continuing) I believe there would be mistakes on that basis.

98 Q You believe there are mistakes; am I correct?

A Now, sir, please—

99 Q Is it a mistake if they count a ballot that is too mutilated to be counted, or not properly marked?

A If that is your definition of a mistake, then that would be a mistake, and my opinion would be that there will be cases of that.

100 Q Can you in any way assure this Court, from your personal knowledge, that such mistakes in the count of paper ballots do not exist in any of the nearly 600 precincts that you have recited took part in this Marion County election in November?

A Do not exist?—no, I Cannot assure the Court that.

101 Q Did you have various reports on Election Day that certain officials of precincts did not even show up?

A Yes, sir. And, in my recollection, I have never seen an election where we haven't had such reports.

102 Q Did you have various reports of machine breakdowns in various precincts?

A We did. Nor have I ever seen an election in this county that that hasn't occurred.

103 Q Did you have any reports from voters with respect to their votes not being counted or tallied, made to you as a member of the Canvassing

[Tr. P. 53]

Board?

A You mean that they went in and tried to vote and the machine didn't function?

104 Q Yes.

A Yes. Yes, sir.

105 Q In other words, by your testimony on direct examination, you did not intend to tell this Court in any manner that there may not be mistakes in the totals of the votes cast for either candidate for United States Senate in the nearly 600 precincts in Marion County the last Election Day, did you?

A I did not intend to tell the Court that, and I didn't think I did.

106 Q However, we understand correctly, by your personal experience in the 1966 councilmanic election, you felt that your personal services could have been employed better elsewhere, if we understand you; am I correct?

A I had wished they would have been, yes.

107 Q And you feel a little against the recount procedures generally on account of that personal experience?

A No, sir, I do not.

MR. TINDER: Thank you.

JUDGE STEVENS: Do you have any redirect?

[Tr. P. 54]

MR. DILLON: Yes, just a few questions.

REDIRECT EXAMINATION,

QUESTIONS BY MR. DILLON:

108 Q Maybe I missed a characterization of your testimony. But you feel that in the paper ballots there will be mistakes; is that not correct?

A If you define a mistake—

109 Q As Mr. Tinder defined it.

A Yes, there will be.

110 Q And you have testified, in your opinion, that those mistakes may have been counted and probably were counted in some precincts by the election board in that precinct?

A I believe, yes, that is my opinion.

111 Q So the essence of the problem, the question I direct to you is: When you get to the paper bag, is there any way, when you look in there, you can make simply a mathematical recomputation without making a judgment call, to determine how it was counted in the precinct?

A No, sir.

112 Q All right. Now, directing your attention to the law book you have got in your hand, Mr. Kelley —or statute, and tell me if you see any place in

[Tr. P. 55]

there, in this statute which Mr. Tinder questioned you about, anything where the commissioners are instructed as to how to handle paper ballots?

A No, I do not.

113 Q As a matter of fact, there is no specific law instructing the commissioners how to count paper ballots, is there?

A To my knowledge, there is not.

MR. DILLON: All right.

JUDGE STEVENS: Mr. Dillon, do you contend they were handled improperly on the recount that your witness testified about?

MR. DILLON: That, plus the theory, you see, that there is no way you can make a mathematical computation on the ones you get back in the bags.

JUDGE STEVENS: In other words, the testimony was that the recount you condemned was improperly conducted?

MR. DILLON: No, no. It is the basis of this man's experience that when you get to this paper bag and you try to make a mathematical computation, you cannot do it without making a judgment call, and that becomes a contest.

JUDGE STEVENS: What I am trying to

[Tr. P. 56]

find out: Is it your position that the recount the witness described was performed in accordance with the statute?

MR. DILLON: It is my position that is only to let the Court know the basis on which he renders his opinion—to build up his expertise to render his opinion. I had the paraphernalia so the Court can see what heppens when a recount starts.

JUDGE STEVENS: I don't think you have answered my question. I'd like to know Counsel's position. Do you contend the recount procedure the witness described was done in accordance with the statute or not?

MR. DILLON: I make no comparison with the Cottingham case. I am trying to show how things are done and why they are done that way and how, in this man's opinion, this one will be done. The simple fact is that when you get into that paper bag on the ballots to reconcile it with the numbers, you have to make a judgment call, and

I think that is what we have established with this witness.

JUDGE DILLIN: Is it your position, Mr. Dillon, that the recount statute is vague and

[Tr. P. 57]

indefinite on its face, because it does not tell the commission how to conduct the recount?

MR. DILLON: Yes, sir.

JUDGE DILLIN: And, therefore, it may necessarily vary from county to county according to the judgment call of the individual judge who appointed the recount commission?

MR. DILLON: As does and is done in the Reports of the Supreme Court, wherein the ballots are fixed so that they start out with a recount and it becomes a judgment call.

JUDGE DILLIN: Yes, but you are wandering off again.

MR. DILLON: I am sorry.

JUDGE DILLIN: Getting back to the very mechanics of conducting the recount, Mr. Kelley has suggested, as I understand it, that one way to verify the vote by a purely mathematical process would be to simply compare—

MR. DILLON: Take——

JUDGE DILLON: Quit interrupting.

MR. DILLON: I beg your pardon.

JUDGE DILLIN: (Continuing)—simply compare the totals as given on the Tally Sheets and the Certificate of Memoranda with those actually recorded in the Clerk's office or whatever perma-

[Tr. P. 58]

nent record is kept, without going into the ballots. He has also suggested that the other way to do it, the way with which he is familiar—done pursuant to direction of a judge—is to actually go into the ballots and make judgment calls.

Now, is it your position that since the statute doesn't say how to do it, that it could be done either way, depending on the discretion of the judge?

MR. DILLON: That is our position, Your Honor.

JUDGE DILLIN: And, therefore, could vary from county to county?

MR. DILLON: And I verily believe it will vary from county to county, yes, sir. And I also believe that the order of the Court which we have introduced into evidence opens up this very question. It does not confine it to that which Your Honor has been described, a pure mathematical recomputation, because it impounds the paraphernalia, et cetera.

JUDGE DILLIN: It really doesn't say how to do it, does it?

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MR. DILLON: No, sir.

JUDGE STEVENS: Are you through, Mr. Dillon?

MR. DILLON: No, sir.

REDIRECT EXAMINATION CONTINUING,

QUESTIONS BY MR. DILLON:

114 Q Mr. Kelley, in Mr. Tinder's cross-examination he made reference to the fact that mathematical errors have been made in the tabulation even by your two groups of people. And you conceded that, of course, there are. Is there not a provision within the statute for correcting those errors?

A Yes, sir.

115 Q I will hand what's been introduced as "Plaintiff's Exhibit 7" and ask you to tell the Court what that exhibit is, if you know.

A Yes. This is a certificate of a corrected result in the 1970 general election of Marion County.

The statute provides that—I am trying to recall the number of days, but, anyway, after the first certificate is given, there is a provision for the Canvassing Board to issue a correction. In fact, it is the Clerk of the Circuit Court that issues the correction.

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116 Q That is exactly what was done with reference to Exhibit 7, is it not?

A Yes, sir.

117 Q In Marion County?

A Yes, sir.

118 Q A mathematical correction was made by the Canvassing Board and sent to the Secretary of State; is that not correct?

A That is correct.

119 Q And that is what that exhibit reflects?

A That is what that exhibit is, yes, sir.

MR. DILLON: All right. That is all I have, Your Honor.

MR. HAMACHER: I have a few questions.

JUDGE STEVENS: All right. The Court would like to put a couple of questions first, if I may. Mr. Kelley, this suggested arithematical, simple procedure that you said would be possible —in your experience with elections in Indiana, have you encountered the use of that recount procedure before?

WITNESS KELLEY: No, sir, because—

JUDGE STEVENS: Well, I just wanted to know whether you had.

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WITNESS KELLEY: No, sir.

JUDGE STEVENS: Also, I understood you to say that there were judgments made by the precinct election boards; is that correct?

WITNESS KELLEY: Yes, sir.

JUDGE STEVENS: Are you referring to judgments as to which envelope to put the ballots in, in the first instance?

WITNESS KELLEY: As to whether a ballot was validly cast or was invalid, yes, sir.

JUDGE STEVENS: Would they fall into the category you described as "judgment calls"?

WITNESS KELLEY: Yes, sir. And, also, as to whether a person was a properly qualified voter or not. They would have to decide that at the precinct level, too.

JUDGE STEVENS: Then, those judgment calls are judged by the Recount Commission if it makes its own evaluations?

WITNESS KELLEY: That is correct.

JUDGE STEVENS: And is it your testimony, then, if it went to Court, this would be reexamined

WITNESS KELLEY: Yes, sir.

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RECROSS-EXAMINATION,

QUESTIONS BY MR. TINDER:

120 Q Mr. Kelley, on redirect examination, Mr. Dillon asked you whether there are any rules to provide how a judgment shall be—what shall be the basis of a judgment made on the recount, and you replied in the negative. Am I correct?

A I don't recall that being his exact question. I am familiar with the statutes that provides a means by which—or attempts to define how you should count paper ballots. Yes, sir, I am familiar with that.

121 Q And would that statute be followed by the recount commissionrs as the only way to count paper ballots under the law?

A I would certainly hope that they would follow it.

122 Q You were a recount commissioner. Did you follow it?

A You didn't ask me about my specific case. We did, sir.

But the one thing that statute doesn't do and the one problem is the identifying marks—what is an identifying mark and what isn't. And the statute doesn't change that, and the law as to identifying marks on ballots has not been changed by that. You try to establish the intent of the voter

[Tr. P. 63]

as best you can. But if the secrecy of the ballot has been violated, then you have got a completely new field of law to worry about. And that statute does not change those cases. At least, that was the position that the Recount Commission that I served on took.

123 Q Are you referring to that part of our election laws which is titled "Burns Revised Statutes, 29-5218"?—which shows how paper ballots must be marked to be effective.

A Yes, sir.

124 Q And that statute, which is a part of the same Election Code which provides for a recount method, specifies eight rules of how paper ballots

shall be marked by the voter to be a valid one; am I correct?

A Yes, sir.

125 Q If we understand you correctly, the only thing that isn't clear is how they make the identifying marks?

A The problem comes up in Rule 7 and 8, and if I might: ". . . Provided, however, any part of a ballot from which it is impossible to determine the elector's choice of candidates, shall not be counted as to the candidate, or candidates, affected thereby." There is the one problem you

[Tr. P. 64]

invariably run into.

The other is: "Any ballot on which an elector shall write his name, initials or a number or special symbol such as a star, circle, parallel lines, circle, dots, or any combination thereof shall be void."

Deciding what is a special symbol and an identifying mark is still within the purview of the election board in the precincts when they count the ballots. And in the Recount Commission which I served on we made those judgments again, substituted our judgment for the precinct.

126 Q And if we understand you, then, if the members of the Recount Commission are in disagreement on any single judgment of a vote cast, they take a majority vote, which shall control at that point, which is then subject to review by the appointing

court and, also, by the courts—the Appellate Courts of this state; am I correct?

A Yes, sir.

JUDGE STECKLER: In that regard, Mr. Kelley, does the machine mechanic exercise a judgment in regard to counting of an absentee paper ballot?

WITNESS KELLEY: I believe so, sir. I

[Tr. P. 65]

know that he is to sign the report, the certificate of the election—the Recount Commission, and he signs it, which is certified, then, to the judge of the court. In the case I was in, he did participate in those decisions, yes, sir.

JUDGE STECKLER: And one of the recount commissioners in the instant matter is a machine mechanic; is that correct? Do you know?

WITNESS KELLEY: No, sir, I do not know.

JUDGE STECKLER: My point is whether he is familiar with the election law to the extent that we are discussing the matter in depth here?

WITNESS KELLEY: No, I would say, in my experience, he was not. He was very familiar with the machines and very helpful in dealing with the machines and in opening the machines and in recounting them. But as to the election law and making these judgments, no, sir, he was a layman.

JUDGE STECKLER: Is there any provision in the Election Code that requires that one

member of the Recount Commission be a machine mechanic?

WITNESS KELLY: Yes, sir, I believe that is so.

MR. HAMACHER: I just have a few questions, where I think the constitutionality of the

[Tr. P. 66]

statute might be involved.

RECROSS-EXAMINATION CONTINUING,

QUESTIONS BY MR. HAMACHER:

127 Q Mr. Kelley, you referred to judgment calls. Where the Recount Commission exercises judgment, am I correct in assuming that this is only where there is something irregular?

A Yes, sir. Where the ballot is not clear as to the voter's intent.

128 Q Now, are there a lot of these in each precinct?

A No, not a lot. I couldn't characterize it as a lot.

JUDGE DILLIN: Well, how many?

WITNESS KELLEY: I would say that, in the recount we did, there were very few precincts that didn't have one or more of these situations in, yes.

129 Q Running up to what? One or more?

A In the case that I recounted, in the limited number of precincts—in approximately 30 precincts which we recounted in Marion County, I believe there were somewhere in the neighborhood of two

[Tr. P. 67]

hundred ballots which question was raised about. I am not saying two hundred of them were changed, but there was serious question about two hundred of them.

130 Q Judgment was required on those?

A Yes, sir.

131 Q You were recount commissioner in a contest, weren't you, for a sub-office or subdivision of the State?

A Yes, sir. It was characterized as a recount contest, yes, sir.

132 Q And in such a contest, under our statutes, the recount commissioners do exercise judgment, don't they? They are required to?

A That is my opinion, yes. Well, it is not clear in the statute, but it is my opinion that you'd have to.

133 Q There is no legislative body that is going to act as final arbiter? The courts are the arbiter?

A Other than the Legislature, yes, sir.

134 Q The Legislature doesn't determine the question involved where a County Commissioner—was it a County Commissioner?

A No, sir, I didn't mean to imply that. No, sir, it is the courts which are the final arbiter.

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135 Q And the court is required in those cases to make a judgment?

A That is absolutely true.

136 Q Have you been a recount commissioner in a case involving a legislative election?

A State legislative election, no, sir.

137 Q Or for a Congressman or Senator?

A No, sir, I have not.

138 Q Mr. Kelley, wouldn't it be perfectly possible to —instead of making the judgment calls you have referred to, to set aside everything that is questionable, along with any changes in your recount, and forward those to the United States Senate for their determination?

A I suppose that would be possible, sir. I don't know what authority a recount commission would have to forward it to the United States Senate.

139 Q Statutory authority?

A As a recount commissioner, when I served, I served under the authority of a Superior Court of Marion County.

140 Q Which was perfectly proper and where judgments were required by the statute?

A Yes, sir.

141 Q Now, if you had been exercising your recount

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commissioner's authority in a case involving the Legislature of the State of Indiana, what would you have done with those items that required judgment?

A Sir, it was my understanding that the Legislature recounts legislative cases and not—and this procedure, the judicial procedure, would not apply. At least, I think that is right.

142 Q As to judgment calls?

A Yes, sir.

143 Q You would certify whatever you found to the Legislature, the proper authority for its determination; is that correct, Mr. Kelley? You may check the statute on that.

A Well, I don't believe that that is the procedure. I think that the Legislature itself recounts. I mean that is my remembrance of the law. I would ask privilege to look it up and change it.

144 Q Go right ahead. Check the statute which states what you do when the court is dealing with a legislative—

MR. DILLON: Question of law, Your Honor.

JUDGE STEVENS: Mr. Hamacher, we will listen patiently to your argument on the law.

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MR. HAMACHER: It is my purpose, Your Honor, to show that the procedure described by the witness properly applies to a state office other than the Legislature or Governor or Lieutenant Governor.

JUDGE DILLIN: Do you know of any situation, Mr. Hamacher, where the Supreme Court of this state has permitted a court-appointed Recount Commission to recount—

MR. HAMACHER: No.

JUDGE DILLIN: As a matter of fact, has it not permitted that done in three separate cases?

MR. HAMACHER: As a pure discovery matter. We don't have a decision.

JUDGE DILLIN: Then, what is the point of your question if we all know as a fact it's never been permitted or done?

MR. HAMACHER: Because the statute provides that the results of the recount will be certified to the proper authorities.

JUDGE DILLIN: Okay. You can argue that.

MR. HAMACHER: Do I understand that the Court doesn't want to hear any more or permit any further questions?

JUDGE STEVENS: I feel it is a legal argu-

[Tr. P. 71]

ment. We will listen to your argument.

JUDGE DILLIN: How about two or three questions, Mr. Kelley? On your direct examination, did I understand you to say that the precinct election boards—or that the inspector of each election board was appointed from the party which carried the largest vote for Secretary of State in the county in the last general election?

WITNESS KELLEY: No, sir, that is not correct. I said that, and that is not correct.

JUDGE DILLIN: What is it?

WITNESS KELLEY: It is the largest number of votes for the office of Secretary of State in the State.

JUDGE DILLIN: So all the inspectors were members of the same political party?

WITNESS KELLEY: That is correct.

JUDGE DILLIN: As a member of the Canvassing Board and having seen these ballots in the Clerk's office, can you give us some idea as to approximately how many paper ballots there are in these envelopes from the precincts which the Superior Court action seeks to have recounted?

WITNESS KELLEY: Yes, sir. I think in the counted, there's somewhere in the neighborhood

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of 6,000 ballots. And the uncounted, I have no idea.

JUDGE DILLIN: Well, based on your previous experience, can you give us some approximation of the ratio of uncounted to counted ballots?

WITNESS KELLEY: Yes, sir, I could, in fact, because I believe that there were about 7500 absentee ballots cast, and if there were counted around 6,000, that would, by simple arithmetic, make about 1500 treated as uncounted.

JUDGE DILLON: Are you talking about 7500 in the county as a whole, or specific wards and precincts?

WITNESS KELLEY: No, sir—in the county as a whole. I have no idea on the specific wards and precincts.

JUDGE DILLIN: So, on the county as a whole, you are correcting your testimony to say about 7500 were cast and about 6,000 counted?

WITNESS KELLEY: That is correct.

JUDGE DILLIN: And you don't know where the contests were that the State Court action is seeking to have recounted?

WITNESS KELLEY: I do not, sir.

JUDGE DILLIN: That is all.

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JUDGE STEVENS: Any other questions?

RE-DIRECT EXAMINATION,

QUESTIONS BY MR. DILLON:

145 Q Mr. Tinder had reference in his cross-examination to the statute which specifies what is and what is not a proper paper ballot; is that correct?

A Yes, sir.

146 Q He called your attention to it?

A Yes, sir.

147 Q Following the mandate of that statute and then looking in that bag where the counted ballots from the precincts are located—if you followed the mandate of the statute, would you have to make a judgment call to reconcile what the precinct election board did?

A Yes, sir.

148 Q There is no way you could reconcile the mandate of the statute with the actual votes in the bag?

JUDGE DILLIN: I think that point has been made five or six times.

MR. DILLON: All right. One last question.

149 Q Were you aware that there are several counties in the State, Mr. Kelley, wherein only paper

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ballots are used?

A Yes, sir.

150 Q Were you aware of how the vote is cast in Wayne County, Richmond, Indiana?

A Yes, sir. It is a paper ballot county.

151 Q The entire county is cast on paper ballots?

A Yes, sir.

MR. DILLON: Thank you.

That is all I have, Your Honor.

JUDGE STEVENS: Any other questions?

Thank you, Mr. Kelley.

WITNESS KELLEY: Thank you, Your Honors.

(WITNESS KELLEY EXCUSED)

JUDGE STEVENS: The Court will recess for about ten minutes, and then we will hear your final arguments.

(The Court was thereupon in recess at 11:50 a.m. on December 17, 1970, at the conclusion of the evidentiary portion of the trial.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

70-66

No. 1232

RICHARD L. ROUDEBUSH,

Appellant,

vs.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

JURISDICTIONAL STATEMENT.

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IN THE

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OCTOBER TERM, 1970.

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RICHARD L. ROUDEBUSH,

Appellant,

vs.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

JURISDICTIONAL STATEMENT.

Appellant appeals from the order of the United States District Court for the Southern District of Indiana, sitting as a three-judge court under 28 U. S. C. § 2284, granting, after notice and hearing, an interlocutory injunction restraining appellant and others from taking any action whatsoever under and pursuant to the provisions of Burns' Indiana Statutes §§ 29-5401 through 29-5417 to conduct a recount for the office of United States Senator for the State of Indiana in Marion County, Indiana, or elsewhere, pending the determination of the action.

OPINIONS BELOW.

The majority opinion of District Judges Steckler and Dillin and the dissenting opinion of Circuit Judge Stevens, which are set out in Appendix A, *infra,* pp. A1 to A19, are not yet reported.

JURISDICTION.

Appellee R. Vance Hartke instituted this action under 28 U. S. C. § 1343(3) for interlocutory and permanent injunctions restraining and enjoining the recount commissioners appointed by the Superior Court of Marion County, Indiana, Room 3, from convening and commencing a recount and restraining and enjoining appellant Richard L. Roudebush from taking any actions to effect recount procedures under the Indiana Election Code on the ground that, insofar as the Indiana Election Code establishes a procedure for a recount of the votes cast for the office of United States Senator, it conflicts with the provisions of Article 1, § 5, of the Constitution of the United States.

On December 17, 1970, appellee Hartke's request for an interlocutory injunction was heard by a three-judge district court convened pursuant to 28 U. S. C. §§ 2281 and 2284, and on a 2-1 vote the request was granted. A notice of appeal to this Court was filed in the United States District Court for the Southern District of Indiana, Indianapolis Division, on December 18, 1970. A copy of the order granting the interlocutory injunction is set out in Appendix B, *infra,* pp. A20 to A22, and a copy of the notice of appeal is set out in Appendix C, *infra,* pp. A23 to A24.

The jurisdiction of this Court to review the order granting the interlocutory injunction is conferred by 28 U. S. C. § 1253.

Cases believed to sustain the jurisdiction of this Court to review the decision below on direct appeal are *Baker* v.

Carr, 369 U. S. 186 (1962), and *Williams* v. *Rhodes*, 393 U. S. 23 (1968).

The statute of Indiana whose validity is involved is Article 27 of the Indiana Election Code, Acts 1945, Chapter 208, page 680, at pages 883 to 890, as amended by Acts 1961, Chapter 313, page 861, at pages 862 to 866. Said Article 27 of the Indiana Election Code, as it appears in Burns' Indiana Statutes, §§ 29-5401 through 29-5417, is set forth in Appendix D, *infra*, pp. A25 to A35.

QUESTIONS PRESENTED.

1. Whether the interlocutory injunction appealed from is prohibited by the plain language of 28 U. S. C. § 2283.

2. Whether Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States, which provides that "'Each house shall be the judge of the elections, returns and qualifications of its own members."

3. Whether, as a matter of law, no irreparable damage would have resulted to appellee Hartke if the interlocutory injunction had not been granted.

STATEMENT OF THE CASE.

Appellant Roudebush and appellee Hartke were candidates for the office of United States Senator at the general election held in the State of Indiana on November 3, 1970. The official canvass of the votes cast showed appellee Hartke to be the winner by 4,283 votes.

Pursuant to Article 27 of the Indiana Election Code (Appendix D, *infra*), appellant filed petitions in the circuit or in a superior court of the counties of Marion, Lake,

Porter, St. Joseph, Vigo, Pike, Clark, Wayne, Grant, Ripley and Madison on or about November 17, 1970, wherein he requested a recount of the votes cast for the office of United States Senator in certain specified voting precincts in such counties. Appellee Hartke appeared in each of the proceedings and filed a motion to dismiss wherein he contended that the various courts lacked jurisdiction over the subject matter because of the alleged conflict of Article 27 of the Indiana Election Code with Article 1, § 5, of the Constitution of the United States. Prior to the filing by appellee Hartke of his complaint for injunctive relief in the court below, the Superior Court of Marion County, Room 3, and the Lake Circuit Court had each denied appellee Hartke's motion to dismiss. Appellees Samuel Walker, John R. Hammond and Duge Butler are the recount commissioners appointed by the Superior Court of Marion County, Room 3.

On December 3, 1970, appellee Hartke filed his complaint in the court below wherein he alleged that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States. The complaint prayed that a three-judge district court be convened pursuant to 28 U. S. C. § 2284 to hear and determine the action and that interlocutory and permanent injunctions be issued restraining and enjoining appellees Samuel Walker, John R. Hammond and Duge Butler from convening and commencing a recount and restraining and enjoining appellant Roudebush from taking any actions to effect recount procedures under the Indiana Election Code. Upon the filing of the complaint, District Judge S. Hugh Dillin entered a temporary restraining order without notice. On December 11, 1970, appellee Hartke filed an amended com-

plaint that included additional prayers for declaratory relief as alternatives to the prayer for injunctive relief.

On December 15, 1970, appellee Theodore L. Sendak, Attorney General of Indiana, was granted leave to intervene as a defendant, and he filed a motion to dismiss the complaint.

On December 16, 1970, appellant Roudebush filed a motion to vacate the temporary restraining order on the ground that it was issued in violation of 28 U. S. C. § 2283, and a motion to dismiss the action on the grounds (1) that the court lacked jurisdiction of the subject matter and (2) that the complaint failed to state a claim against appellant upon which relief could be granted.

On December 17, 1970, appellee Hartke's request for an interlocutory injunction was heard by a three-judge district court composed of District Judges William E. Steckler and S. Hugh Dillin of the United States District Court for the Southern District of Indiana and Circuit Judge John P. Stevens of the United States Court of Appeals for the Seventh Circuit. By a 2-1 vote, Circuit Judge Stevens dissenting, the court held Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, to be unconstitutional and issued the interlocutory injunction requested by appellee Hartke.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

I. The Interlocutory Injunction Appealed From Is Prohibited by 28 U. S. C. § 2283.

The Anti-Injunction Act, 28 U. S. C. § 2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Despite the plain language of the foregoing statute, the court below did enjoin the election recount proceedings pending in the Superior Court of Marion County, Indiana, Room 3, and further enjoined the appellant from taking any action elsewhere to obtain a recount of votes, thereby staying proceedings pending in state courts located in ten additional Indiana counties. The court made no attempt to justify the injunction as falling within one of the three specific exceptions defined in the Act. Instead, it held that the Act was discretionary in its application, saying:

> "* * * One view, which we find persuasive, is that Section 2283 is not a jurisdictional statute, but is rather, in essence, a statutory adoption of the doctrine of comity and hence discretionary in its application. In spite of its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances justify such relief. * * *" (Appendix A, *infra*, p. A5)

Such a view of the Anti-Injunction Act has been expressly rejected by this Court. *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U. S. 281 (1970); *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U. S. 511 (1955). In *Atlantic Coast Line* it was expressly held "that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld."

The court below also noted the theory stated in *Cooper* v. *Hutchinson*, 184 F. 2d 119 (3rd Cir. 1950), that the mention in 42 U. S. C. § 1983 of a "suit in equity" constitutes the express authorization by an Act of Congress required by 28 U. S. C. § 2283 for an injunction against proceedings pending in a state court. (Appendix A, *infra*, pp. A12 to A13) Although the complaint below alleges that the court has jurisdiction pursuant to 28 U. S. C. § 1343(3), it is not

alleged that the action below is authorized by 42 U. S. C. § 1983. Indeed, appellee Hartke could not base his action upon 42 U. S. C. § 1983, because the rights, privileges and immunities protected by 42 U. S. C. § 1983 are those guaranteed by the Fourteenth Amendment. *Monroe* v. *Pape*, 365 U. S. 167 (1961). Inasmuch as the complaint alleges that the recount provisions of the Indiana Election Code conflict with Article 1, § 5, of the Constitution of the United States, the jurisdiction of the district court can be sustained only under 28 U. S. C. § 1331(a), if at all. *Powell* v. *McCormack*, 395 U. S. 486 (1969). Since 28 U. S. C. § 1331(a) contains no provision expressly authorizing an injunction to stay proceedings in a state court, and since the injunction issued was not necessary in aid of the court's jurisdiction, or to protect or effectuate its judgments, it results that the injunction appealed from is prohibited by 28 U. S. C. § 2283.

II. Article 27 of the Indiana Election Code Is Constitutional.

The holding of the court below that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, is unconstitutional presents a question that is manifestly substantial.

Article 1, § 4, of the Constitution of the United States provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." The only regulations that the Congress has made governing the election of senators and representatives are set forth in 2 U. S. C. §§ 1 through 9. With respect to the election of senators, the Congress has specified only the time

for election and the manner of certification. All other aspects have been left to the States. In the Indiana Election Code, provision has been made covering all phases of the election of a United States Senator from the nomination of party candidates for the office at state conventions (Burns' Indiana Statutes § 29-3703) through the right to have a recount of the vote after the election. (§ 29-5402)

On the other hand, while the Indiana Election Code makes provision for the contest of elections to certain offices, viz. Burns' Indiana Statutes §§ 29-5501 through 29-5508 and §§ 29-5601 through 29-5617, no provision is made for the contest of the election of a United States Senator. The reason for the omission is obvious, because exclusive jurisdiction is vested in the Senate by Article 1, § 5, of the Constitution of the United States, which provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."

In holding that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, is in conflict with Article 1, § 5, of the Constitution of the United States, the court below has misread the provision of the Constitution upon which it relies. It says that each house shall be the *judge* of the elections, returns and qualifications of its own members. It does not say that each house shall *count* the votes cast at such election. Indeed, if the district court's position that Article 1, § 5, forbids a recount of votes for members of the United States Senate were to be accepted, then it logically follows that it forbids the initial count of such votes as well. The state's jurisdiction would end once the polls were closed, and the Senate would have to tally the vote. But merely to state the proposition demonstrates its absurdity.

Article 1, § 4, of the United States Constitution, which provides that the times, places and manner of holding elec-

tions for senators and representatives shall be prescribed in each state by the legislature thereof, and Article 1, § 5, which provides that each house shall be the judge of the elections, returns and qualifications of its own members, are in *pari materia* and must be construed with reference to each other. Until the election conducted pursuant to Article 1, § 4, has been concluded, the power to judge the result thereof under Article 1, § 5, does not come into play.

The court below clearly erred in equating a proceeding for a recount provided as an integral step in the election process with a contest. There is an essential difference between a statutory recount and a contest. A recount proceeding involves no more than a ministerial recounting of the votes cast. The recount certificate is not an adjudication of the title to the office, but only *prima facie* evidence of the votes cast for the office. Burns' Indiana Statutes § 29-5414. By contrast, in order to contest an election, some cause must be alleged, such as malconduct, ineligibility, bribery or illegality. The purpose of the proceeding is to finally determine the rights to the office by permitting both parties to present evidence to support their contentions.

The Supreme Court of Indiana has never passed on the validity of Article 27 of the Indiana Election Code as it applies to elections of United States Senators and Representatives. However, the trend of recent authority in other states is to uphold the constitutionality of recount statutes in such elections. *Wickersham* v. *State Election Board,* 357 P. 2d 421 (Okla. 1960); *Blackburn* v. *Hall,* 115 Ga. App. 235, 154 S. E. 2d 392 (1967); *accord, Rice* v. *Power,* 19 N. Y. 2d 106, 224 N. E. 2d 865 (1967); see *Odegard* v. *Olson,* 264 Minn. 439, 119 N. W. 2d 717 (1963) (concurring opinion of Knutson, *C. J.*); *Laxalt* v. *Cannon,* 80 Nev. 588, 397 P. 2d 466 (1964); *Comment, Congressional*

Election Contests and Recount Proceedings: A Critical Difference, 72 Dickinson L. Rev. 433 (1968).

In the light of the foregoing authority, it is clear that Article 27 of the Indiana Election Code is valid and constitutional as applied to the election of a United States Senator.

III. No Irreparable Damage Was Threatened.

In order to find irreparable damage to justify the issuance of an interlocutory injunction, the majority of the district court reasoned that appellee Hartke has a constitutional right to have the United States Senate act as sole judge of the Indiana election returns, that it is essential to this right that the integrity of the election materials be preserved so that no question may arise as to the character of the evidence that the Senate will be called upon to judge, and that appellee Hartke's rights will be irreparably harmed if such evidence is compromised, for which there can be no adequate remedy at law. The supposed irreparable damage that the court thought justified the granting of the injunction is as follows:

> "* * * The harm to be avoided will take place immediately, if not enjoined. Like Humpty Dumpty, the seals on the ballots cannot be put back together again, if once destroyed, hence the frequent reason given for abstention—that all can be made right through state appellate procedures—does not apply." (Appendix A, *infra,* pp. A14 to A15.)

But the breaking of the seals on the ballot bags and voting machines does not mean that the integrity of the election materials will be compromised. After the recount has been completed, new seals can be affixed. As observed by Circuit Judge Stevens in his dissenting opinion, "the evidence establishes without contradiction that the Indiana recount procedures have integrity, that the original ballots

and other records are carefully preserved for future study, that an adequate record of what transpires during a recount is maintained, and that any judgment as to whether or not certain categories of ballots (or even individual ballots) should be counted, may be reviewed subsequently by the body having the power finally to resolve an election contest." (Appendix A, *infra*, p. A18) In this regard, Burns' Indiana Statutes § 29-5411 provides that "each candidate affected by such recount shall be entitled to have a watcher present at such recount and shall himself have the right to be present," and that "representatives of the press shall also be entitled to attend such recount." In addition to this, Burns' Indiana Statutes § 29-5413 makes it the duty of the court in which the recount petition is filed to provide by order for the protection of all ballots and voting machines together with all tally sheets relating thereto and all lists of the names and addresses of all persons registered by the clerk as having voted for such office or offices. (Appendix D, *infra*, pp. A30 to A31)

The conclusion of the district court that appellee Hartke will sustain immediate and irreparable damage if the seals on the ballot bags and voting machines are broken is unsupported either by fact or by law.

SHOWING OF ABUSE OF DISCRETION.

In granting the interlocutory injunction appealed from, the district court abused its discretion in the following matters:

1. Since the complaint seeks to stay proceedings in a state court in violation of 28 U. S. C. § 2283, the district court's lack of jurisdiction is evident upon the face of the complaint. *United States* v. *Corrick*, 298 U. S. 435 (1936).

2. The opinion of the district court holds Article 27 of the Indiana Election Code unconstitutional with respect to

the office of United States Senator. The court thereby committed serious error in thus dealing with the case upon application for an interlocutory injunction, since that question was not then before it. *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310 (1940).

3. The statements of fact contained in the court's opinion mingled with arguments and inferences do not constitute a fair compliance with Rule 52(a) of the Federal Rules of Civil Procedure. The court was required to make explicit findings of fact regarding the irreparable damage that would be sustained by appellee Hartke if the proceedings in the state courts were not stayed. *Mayo* v. *Lakeland Highland Canning Co.*, 309 U. S. 310 (1940).

4. No showing was made why appellee Hartke could not have obtained relief in the pending state court proceedings or from the Supreme Court of Indiana.

5. As a matter of law, no irreparable damage would have resulted to appellee Hartke if the interlocutory injunction had not been granted.

CONCLUSION.

For the foregoing reasons, probable jurisdiction should be noted and the appeal set for an early hearing.

Respectfully submitted,

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APPENDIX A.

OPINIONS BELOW.

UNITED STATES DISTRICT COURT,
Southern District of Indiana,
Indianapolis Division.

VANCE HARTKE, *Plaintiff,*
vs.
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER, *Defendants,*
THEODORE SENDAK, Attorney General of Indiana, *Intervening Defendant.*

No. IP 70-C-694.

OPINION.

This cause was heard before a three-judge District Court convened pursuant to 28 U. S. C. § 2284, on plaintiff's application for a preliminary injunction to enjoin the operation and enforcement of Chapter 54 of Title 29 of the Indiana Election Code, Burns Ind. Stat. Ann. § 29-5401 through § 29-5417, upon the ground that the application and operation of such statutes in respect to an election for the office of United States Senator is unconstitutional.

At the general election of November 3, 1970, the plaintiff, Vance Hartke, an incumbent United States Senator for Indiana, and the defendant Richard L. Roudebush were opposing candidates for Hartke's office. The canvass reflected that Hartke received the highest number of votes cast for such office, and on November 16, 1970, the Secretary of State certified him to the Governor of Indiana as duly elected and the Governor, on December 3, 1970, gave to said candidate a certificate of his election, in the form required by Burns Ind. Stat. Ann. § 29-5309.[1] The certificate has been filed with the Secretary of the United States Senate.

On November 17, 1970, defendant Roudebush filed in the Superior Court of Marion County, Indiana, a petition for a recount of the votes cast in selected precincts of Marion County, stating in said petition his desire to contest said election. This court knows judicially that similar petitions were filed by him in ten other counties of the State of Indiana. The Superior Court of Marion County overruled a motion to dismiss the petition, and proceeded to appoint the defendants Samuel J. Walker, John R. Hammond, and Duge Butler as a recount commission to recount the votes cast for the office of United States Senator in such selected

1. Section 29-5309. "The secretary of state as soon as he shall receive such certified statements, shall compare and estimate the votes given for United States senator and for representative in Congress, and certify to the governor the persons having the highest number of votes as duly elected; and the governor shall give to each of the persons returned to him as aforesaid a certificate of his election, sealed with the seal, and attested by the secretary of state: Provided, That no return of any county which has come into its hands, and which has been duly authenticated by the clerk of the circuit court thereof, under seal, as hereinbefore provided shall be rejected by said secretary of state, but he shall estimate, aggregate and tabulate, and report to the governor the total number of votes cast in each county for each candidate for state office, supreme judge or other officer to be elected by all the voters of the state, and members of congress, as evidenced by the face of such returns so certified to him."

precincts of Marion County, relying upon the Indiana recount statute, Burns Ind. Stat. Ann. §§ 29-5401—29-5417, the pertinent parts of which are set out below.[2] Said recount was ordered to be commenced on December 8, 1970.

2. Section 29-5401. "Any candidate for any public office voted upon at any election held within the state of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the conditions and in the manner and with the effect as in this article [§§ 29-5401—29-5417] provided."

Section 29-5402. "The right of recount provided in this article [§§ 29-5401—29-5417] shall be available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipal, county, district, judicial, legislative, and state elective office and candidates for membership in the house of representatives and in the senate of the United States; and such right of recount may by any candidate be exercised with respect to one [1] or several or all of the voting precints in which votes were cast for the office for which he was a candidate."

Section 29-5405. "Each such petition shall state the office and the precinct or precincts within the county in respect of which the petitioner desires a recount; . . . that the petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that the petitioner desires to contest said election in respect of said office, . . . and that he desires a recount of all of the votes cast for such office in such precinct or precincts. The term 'contest' as used in this section shall include all forms of contest herein or hereafter recognized as appropriate means for contesting title to a public office. . . ."

Section 29-5409. "Upon the filing of such petition and undertaking, the court or the judge thereof in vacation shall, upon the expiration of twenty-five [25] days after such election and upon proof of service of said notice or notices, grant such petition and cross-petition or cross-petitions as may have been filed and order the recount of such votes in such precinct or precincts. . . ."

Section 29-5414. "When such recount is completed by the commission, it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court.

"(Except for the offices of governor, lieutenant-governor, and

On December 3, 1970, plaintiff Hartke brought this action to enjoin the defendant recount commission from proceeding with the recount in Marion County, and to enjoin the defendant Roudebush generally from taking further action to obtain a recount in the other counties in which his recount petitions were filed. Jurisdiction was predicated on 28 U. S. C. § 1343(3), with request that a three-judge district court be convened to hear the case, pursuant to 28 U. S. C. § 2284. The jurisdiction of a three-judge court over an action in which a candidate for the Congress of the United States alleges the deprivation of a right under color of a state election law, and the unconstitutionality of such law in the light of the Constitution of the United States has been recognized. *Voltaggio* v. *Caputo*, D. N. J., 1963, 210 F. Supp. 337, app. dis., 371 U. S. 232, 83 S. Ct. 325, 9 L. Ed. 2d 494. See also *Socialist Labor Party* v. *Rhodes*,

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members of the general assembly), such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; . . ."

Section 29-5415. "If a recount is had in respect to an office for which votes were cast in all voting precincts of the state (except governor and lieutenant-governor), or in more than one [1] county (except members of the general assembly), the clerk of the circuit court where such recount was had shall determine whether the votes as shown by such recount certificates differ from the votes in such precinct or precincts as the same had been returned to, and tabulated by the county canvassing board, and if he finds there is such difference he shall make his certificate showing the total vote in such county for such office for each candidate as corrected in accordance with the votes shown by such recount certificate and shall forthwith transmit the same to the secretary of state . . . and if the secretary of state shall previously have included in his tabulations votes cast for such office as returned by such county canvassing board he shall correct such tabulation, . . . and the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office."

Note: Portions in ( ) added by 1961 amendment, as discussed *infra*.

S. D. Ohio, 1968, 290 F. Supp. 983, aff'd as modified, *sub nom Williams* v. *Rhodes*, 393 U. S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24. This court was properly convened, and has jurisdiction in the premises.

The attorney General of Indiana has been permitted to intervene, pursuant to 28 U. S. C. § 2284(2), and has filed a motion to dismiss the action. The defendant Roudebush has likewise moved to dismiss. An argument common to both motions is that this court lacks jurisdiction to grant injunctive relief, as prayed for, because prohibited by 28 U. S. C. § 2283.[3]

The statute referred to has been characterized as ambiguous, by the Supreme Court of the United States, speaking without dissent. *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, 77 S. Ct. 287, 1 L. Ed. 2d 267. It is therefore not surprising that various, and to some extent contradictory, interpretations of it have been made. One view, which we find persuasive, is that Section 2283 is not a jurisdictional statute, but is rather, in essence, a statutory adoption of the doctrine of comity and hence discretionary in its application. In spite of its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances justify such relief. *Baines* v. *City of Danville*, 4 Cir., 1964, 337 F. 2d 579, 593. This appears to be particularly true with respect to cases arising pursuant to 42 U. S. C. § 1983, as to which 28 U. S. C. § 1343, under which this suit is brought, is the jurisdictional analogue. *Machesky* v. *Bizzell*, 5 Cir., 1969, 414 F. 2d 283; *Carmichael* v. *Allen*, N. D. Ga., 1967, 267 F. Supp. 985 (three-judge court); *Landry* v. *Daley*, N. D. Ill., 1968, 288 F. Supp. 194; 233. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22.

3. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Another ground for dismissal urged by the defendant Roudebush is that this court lacks jurisdiction because exclusive jurisdiction to determine the effect of the recount proceedings commenced by him is in the United States Senate by virtue of Article 1, Section 5 of the Constitution of the United States, which provides "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." But a right claimed under the same Constitutional provision—the right to have the returns of the November 3 election judged by the Senate and not piecemeal by various commissions appointed by various state courts—is the very right which plaintiff asserts is being violated by the defendant Roudebush's state court actions. Regardless of the position taken, all parties agree as to the supremacy of the Senate itself to make the final determination as to the winner of the recent election. *Reed* v. *County Commissioners,* 277 U. S. 376, 48 S. Ct. 531, 72 L. Ed. 924; *Barry* v. *U. S. ex rel. Cunningham,* 279 U. S. 597, 49 S. Ct. 452, 73 L. Ed. 867.

The great weight of authority supports plaintiff's position that court proceedings for recount or contest with regard to an election for representative in the national House of Representatives or for United States Senator are unconstitutional, as in conflict with Article 1, Section 5, whether brought in state or federal court. *State ex rel. Fleming* v. *Crawford,* 1891, 28 Fla. 441, 10 So. 118; *Burchell* v. *State Board of Election Commissioners,* 1934, 252 Ky. 823, 68 S. W. 2d 427; Opinion of the Justices, 1956, 152 Me. 212, 142 A. 2d 532; *Belknap* v. *Board of Canvassers,* 1893, 94 Mich. 516, 54 N. W. 376; *McLeod* v. *Kelly,* 1942, 304 Mich. 120, 7 N. W. 2d 240; *State ex rel. 25 Voters* v. *Selvig,* 1927, 170 Minn. 406, 212 N. W. 604; *Odegard* v. *Olson,* 1963, 264 Minn. 439, 119 N. W. 2d 717; *State ex rel. McCue* v. *Blaisdell,* 1908, 18 N. D. 55, 118 N. W. 141; *Laxalt* v. *Cannon,* 1964, 80 Nev. 588, 397 P. 2d 466; Opinion of the

Justices, 1921, 80 N. H. 595, 113 A. 293; *Smith* v. *Rolk*, 1939, 135 Ohio St. 70, 19 N. E. 2d 281; *Sutherland* v. *Miller*, 1917, 79 W. Va. 796, 91 S. E. 993; *State ex rel. Wettengel* v. *Zimmerman*, 1946, 249 Wis. 237, 24 N. W. 2d 504; *Keogh* v. *Horner*, 1934, S. D. Ill., 8 F. Supp. 933; *Peterson* v. *Sears, et al.*, 1964, N. D. Iowa, 238 F. Supp. 12.

An equally strong body of authority supports the same rule with regard to the lack of jurisdiction in the courts to countenance suits for recount or contest with regard to elections of members of the State legislatures. The reasoning is identical and is predicated on provisions of the various state constitutions which copy Article 1, Section 5 of the Constitution of the United States either verbatim or in substance. We deem it unnecessary to burden this opinion with a collection of these many cases, inasmuch as the Supreme Court of Indiana has had occasion to speak three times in the past twenty years on the subject of legislative recounts, attempted under the statute here involved, Burns Ind. Stat. Ann. §§ 29-5401—29-5417, inclusive.

This trilogy consists of the cases of *State ex rel. Acker, et al.* v. *Reeves*, 1951, 229 Ind. 126, 95 N. E. 2d 838, *State ex rel. Beaman* v. *Circuit Court of Pike County, et al.*, 1951, 229 Ind. 190, 96 N. E. 2d 671, and *State ex rel. Batchelet* v. *DeKalb Circuit Court, et al.*, 1967, 248 Ind. 481, 229 N. E. 2d 798. The provision of the Constitution of Indiana which controlled the cases is Article 4, Section 10, which is virtually identical to Article 1, Section 5 of the Constitution of the United States.[4] In each case, a defeated candidate for the General Assembly of Indiana filed a petition for a recount pursuant to Burns Ind. Stat. Ann. §§ 29-5401—29-5417, in each case the trial court appointed a recount commission, and in each case the Supreme Court of Indiana

4. Article 4, Section 10: "Each House, when assembled, shall . . . judge the elections, qualifications and returns of its own members."

issued a writ of prohibition restraining the court from proceeding with the recount on the ground that it was constitutionally impermissible in the light of Article 4, Section 10.

In order to understand *Acker*, *Beaman*, and *Batchelet*, and, for that matter, our own decision, it is necessary to make plain what the unadorned word "recount" has been taken to mean in Indiana. It will be noted immediately that the statute (Footnote 2) does not specify in what manner the recount shall be conducted; however, we find from the undisputed evidence in the case before us, and in addition know judicially, that by custom, usage and practice recounts in Indiana have been conducted under the statute as follows: (1) with regard to votes registered on voting machines, the machines are inspected by the commission, and the totals checked against the tally sheets and certificates of memoranda as to total votes cast for each office; this operation is purely mechanical and/or mathematical and creates no problems; (2) with regard to votes cast by paper ballot, which includes all of the votes cast in some of the counties of the State of Indiana and a part of the votes cast in all counties of the State, the commission exercises its own judgment, sometimes supplemented by instructions from the court which appoints it, as to which ballots are to be counted and which not counted, and thereby, for all purposes, nullifies and supersedes the judgment of the duly constituted election boards in this regard.

Further, the election laws provide that after tallying the vote, each local election board must place in separate envelopes, clearly marked, all of the ballots which it counted, and all of the ballots which it did not count. Such envelopes are then sealed with wax, to preserve their integrity. The commission necessarily breaks the seals and removes the ballots for the purpose of its recount—or rejudging, as would appear to be more accurate—and reas-

sembles them according to its own determinations, which may well be by 2-1 vote in many instances.

There is no way in which the commission may make a simple mathematical verification of the vote. As illustrative of the problems encountered, a ballot may, under certain circumstances, be valid and countable for one office, but not for another. If counted for any office it is placed in the "counted" envelope; but the commission has no way of knowing how the election board counted it—whether for all offices, or only for some. The main problems, of course, arise with respect to the counting of ballots not absolutely perfect on their face. What is a distinguishing mark? What was the intent of the voter? As the record in the many permissible recount cases, too numerous to cite, all reflect, judgments must constantly be made in determining which ballots to count and which not to count when "recounts" are made under the Indiana recount law.

It was in this context, then, that the Supreme Court of Indiana first confronted the constitutional question as to the jurisdiction of the Indiana courts to appoint recount commissions with respect to an election for a seat in the Indiana House of Representatives. The Court quoted Article 4, Section 10 Indiana Constitution and pointed out its similarity to Article 1, Section 5 United States Constitution. It then quoted with approval from *Lucas* v. *McAfee*, 1940, 217 Ind. 534, 29 N. E. 403, 29 N. E. 2d 588, as follows:

> " 'The right of legislative bodies to judge the elections, qualifications, and returns of their own members is of ancient origin. The history of the doctrine reveals that it was established in the constitutional law of England in the year of 1586, during the reign of Queen Elizabeth. . . .
>
> 'Provisions guaranteeing this right are to be found in the federal Constitution and in the organic law of every state in the Union, in language substantially if

> not identically like that employed in ours. . . . That right is deemed essential to the enactment of legislation without interruption and confusion and to maintain a proper balance of authority where the functions of government are divided between coordinate branches. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread. Dinan v. Swig, 1916, 223 Mass. 516, 112 N. E. 91.' "

The Court then went on to hold the statute unconstitutional and void to the extent that it purported to apply to members of the General Assembly, and entered its writ of prohibition accordingly.

Beaman, like *Acker*, arose out of the general election of 1950, and was considered at about the same time by the same court. Here original suits were brought in two counties to obtain a recount for the office of Joint State Senator and recount commissions were appointed in each county. The judges of the two courts were again prohibited from proceeding with the recounts. On behalf of respondents, as in the case before us, the argument was made that in carrying out the provisions of the recount statute the courts and their commissions were acting simply in a ministerial capacity. The Court pointed out its recent decision in *Acker*, and held that since the recount statute was unconstitutional as applied to recounts for the legislature, it was, to such extent, void ab initio and inoperative from the time of its passage. Therefore, it reasoned, it could not confer any jurisdiction upon any court either for the performance of judicial or ministerial acts, and hence the appointment of recent commissioners was beyond the lawful jurisdiction of the courts involved.

Also, as here, respondents argued that a recount of votes is not an adjudication of the election or rights to an office

but is only a proceeding in discovery. The Supreme Court rejected this theory also, pointing out the provisions of Section 29-5414, "*Such recount certificates shall supersede for all purposes all previous returns* . . ." (Supreme Court's emphasis), and of Section 29-5415, ". . . the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election . . . notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office." The Court concluded from such provisions that if the effect of the statute was not an adjudication of the election and returns of members of the legislature it approached so nearly thereto "that it may interfere with the constitutional right of each house of the Legislature to judge the elections and returns of its members . . . its effect is more than a mere procedure for the discovery of evidence." Unconstitutionality was reaffirmed.

These decisions put the matter at rest for the next several years. However, in 1961 the General Assembly attempted to bring the law into conformity with the Indiana Constitution with respect to the members of the general assembly and certain other state officers. It did so by inserting the language "Except for the offices of governor, lieutenant-governor, and members of the general assembly" where the same presently appear in Sections 29-5414 and 29-5415 (set out in ( ), Footnote 2), and by adding certain paragraphs to Section 29-5414 to provide that with respect to the general assembly, the results of the recount would be forwarded to the appropriate presiding officer for information only. It will be noted that all of the language found in *Beaman* to constitute a recount "more than a mere procedure for the discovery of evidence" remained untouched as to recounts for the office of United States Senator.

However, the effort to legitimize recounts for the General Assembly failed. In *Batchelet* a recount for State Senator was attempted in the DeKalb Circuit Court under the amended statute, and that Court appointed a recount commission. The recount was immediately halted by a temporary writ of prohibition issued by the Supreme Court of Indiana. The Senate itself then resolved the dispute, as provided by Article 4, Section 10. In thereafter making the temporary writ permanent, instead of simply dismissing the proceeding as moot in light of the seating of Senator Batchelet, the Supreme Court again quoted from *Acker:* "(The) right of legislative bodies to judge the election, qualifications, and returns of their own members is of ancient origin. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread." The lower court was held to have no jurisdiction.

If, as cannot possibly be denied, it is unconstitutional under Indiana law for an Indiana Circuit or Superior Court to conduct a recount for the office of member of the General Assembly, even after the passage of the abortive 1961 amendments, *a fortiori* it is manifestly repugnant to the Constitution of the United States for such a court to attempt to conduct a recount for the office of United States Senator, as to which office such amendments were not even sought to be applied.

We now return to further discussion of the effect, or lack of effect, of 28 U. S. C. § 2283. At the outset, it will be noted that the section contains three specific exceptions which remove the statutory inhibition in certain circumstances (Footnote 3). Obviously, if the suit at hand falls within one of the exceptions, no further discussion is required. It has been urged in recent cases arising under 42 U. S. C.

§ 1983[5] and brought pursuant to 28 U. S. C. § 1343 that Section 1983 itself furnishes a specific exception applicable to Section 2283, in that it specifically authorizes relief by "... suit in equity, or other proper proceeding for redress." Indeed, it has been so held. *Cooper* v. *Hutchinson*, 3 Cir., 1950, 184 F. 2d 119. In *Dombrowski, supra*, the Supreme Court found decision of this question unnecessary to its disposition of the case, and therefore declined to resolve it. It likewise specifically declined to resolve the question in *Cameron v. Johnson*, 390 U. S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182. The proposition therefore remains quite viable.

However, it is true that whether one takes the view of the Third Circuit as expressed in *Cooper* that Section 1983 constitutes a specific exception to Section 2283, or whether one takes the view we have adopted that notwithstanding Section 2283 a state court proceeding may be enjoined where special circumstances justify such relief, it does not follow that equitable relief will automatically be granted. Indeed, in some of the cases relied upon in support of each of the rules as above stated, refining the scope of Section 2283, injunctive relief was ultimately denied by reason of the application of principles of comity and the abstention doctrine. E.g., *Baines* v. *City of Danville, supra; Cooper* v. *Hutchinson, supra.*

The question involved here is one of federal constitutional law, and the state statute involved is not of an uncertain nature. Neither is the state statute susceptible of a limiting construction, because it has already been construed

5. Section 1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

three times by the Supreme Court of Indiana and thrice held unconstitutional. In such circumstances the abstention doctrine does not apply. *Harman* v. *Forsenius,* 380 U. S. 528, 85 S. Ct. 1177, 14 L. Ed. 2d 50; *Baggett* v. *Bullitt,* 377 U. S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377; *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440; *McNeese* v. *Board of Education,* 373 U. S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622; *City of Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77, 78 S. Ct. 1063, 2 L. Ed. 2d 1174; *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101, 65 S. Ct. 152, 89 L. Ed. 101.

Just as the defunct legal posture of the Indiana recount statute makes clear that abstention is not appropriate, the special circumstances disclosed by the facts impel the conclusion that the active interposition of this Court is required. What defendants are threatening to do, and will do if not enjoined, constitutes an interference with the orderly processes of the recent election, and with the Constitutional prerogatives of the United States Senate. The plaintiff, as a candidate for re-election to that body, has a constitutional right to have the election contest, if there is to be one, held before the sole tribunal having jurisdiction in the premises, the Senate itself. It is essential to plaintiff's right that the integrity of the ballots cast at such election be preserved, i.e., that they be held in their original envelopes, with the seals intact, and that the integrity of the tally sheets, voting machines, and other paraphernalia of the election likewise be preserved until such time as they may be called for by the Senate, so that no question may arise as to the character of the evidence which the Senate will be called upon to judge. Plaintiff's rights will be irreparably harmed if such evidence is compromised, for which there can be no adequate remedy at law. The harm to be avoided will take place immediately, if not enjoined.

Like Humpty Dumpty, the seals on the ballots cannot be put back together again, if once destroyed, hence the frequent reason given for abstention—that all can be made right through state appellate procedures—does not apply.

We surmise that the defendant's argument here would be less heated if, for example, we had before us, instead of a purported recount commission appointed by the Superior Court of Marion County, a purported recount commission appointed by a Justice of the Peace of Beanblossom Township, Brown County, Indiana, directed by the Justice to open, inspect, and judge anew all of the ballots cast in the whole State for the office of United States Senator. But what would be the difference?

As was said by the Supreme Court of Indiana in *Beaman*, the statute involved was void *ab initio* and conferred no power upon any court to perform either a ministerial or a judicial act thereunder, as to "recounts" for legislative office. Consistently, therefore, there could be no difference at all between the legal standing of the defendant commissioners in this action, and the hypothetical Brown County commissioners. Thus considered, what we are here enjoining is not in any true sense a "proceeding" in a State court, but, more appropriately, a threatened invasion of the sanctity of the ballots by persons acting wholly without legal authority.

The respective motions to dismiss the action are therefore each denied, and a preliminary injunction will issue forthwith, as prayed for by the plaintiff, upon his giving bond as provided in Rule 65(c), F. R. C. P., in the penal sum of $5,000.00.

Dated this 19th day of December, 1970, as of December 17, 1970, at 5:45 P. M., pursuant to the oral announcement

of the Court's decision and order at the conclusion of the hearing on the prayer for a preliminary injunction.

/s/ WILLIAM E. STECKLER,
William E. Steckler,

/s/ S. HUGH DILLIN,
S. Hugh Dillin,
Judges of the United States District Court.

Certified, A true copy, Arthur J. Beck, Clerk, U. S. District Court, Southern District of Indiana.

/s/ JAS. R. TYRE,
Deputy Clerk.

UNITED STATES DISTRICT COURT
Southern District of Indiana,
Indianapolis Division.

VANCE HARTKE,
Plaintiff,
vs.
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER,
Defendants.

No. IP 70-C-694.

STEVENS, *Circuit Judge,* dissenting.

Regardless of whether or not we agree with the Indiana trial court's construction of Indiana law (and we should not substitute our interpretation of state law for his), we still must decide whether a federal court should enjoin a recount of votes cast for the office of United States Senator pursuant to state election laws. No federal court has ever done so before.

In my opinion the temporary restraining order was improvidently entered on December 3, 1970, and should be vacated. At that time the recount was not scheduled to commence until December 8, 1970. No explanation has been advanced for the failure to seek review in the Indiana Supreme Court, including a stay of the recount if needed to give that Court adequate time to consider all issues, both state and federal, subject to further review, if necessary, by the United States Supreme Court. See *United States ex rel. Lawrence* v. *Woods,* No. 18169, 7th Cir., October 19, 1970 (slip opinion, pp. 4-6). Nor has there been any suggestion that the Indiana judiciary is not perfectly

capable of handling Indiana litigation without assistance or interference from a federal district court. I think this court is prohibited from enjoining the recount by the plain language of 28 U. S. C. Section 2283, and Supreme Court opinions articulating the policy underlying that statute.[1] *Atlantic C. L. R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281; *Amalgamated Clothing Workers* v. *Richmond Bros. Co.,* 348 U. S. 511.

Plaintiff asserts that an injunction should be granted to protect him from a deprivation of his constitutional right to have the United States Senate act as the sole judge of the Indiana election returns, U. S. Const., Art. I, Section 5. But the proof which he offered does not establish any threatened deprivation of that right. In my opinion the exercise of "judgment" by state election officials at various stages of the counting and recounting of ballots does not invade the Senate's power to make the final judgment on the outcome. The evidence establishes without contradiction that the Indiana recount procedures have integrity, that the original ballots and other records are carefully preserved for future study, that an adequate record of what transpires during a recount is maintained, and that any judgment as to whether or not certain categories of ballots (or even individual ballots) should be counted, may be reviewed subsequently by the body having the power finally to resolve an election contest.

Plaintiff has failed to prove that he would suffer irreparable harm if the recount were permitted to proceed. Indeed, it is entirely possible that the recount would show that a Senate contest would be futile, and thereby avoid a pro-

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1. I also think it was improper to enter the temporary restraining order without notice five days before the recount was scheduled to commence. In my opinion notice to the opposite party should always be required absent a compelling showing of need and a convincing explanation for the failure to give notice.

tracted controversy which may now be required. Moreover, as a practical matter, I would assume that the work of the Senate would be facilitated, rather than impaired, by the availability of a fairly conducted recount, in addition to the original count, before undertaking its work.[2]

I would vacate the temporary restraining order and dismiss the complaint.

2. We have not been advised about the Senate procedures for resolving election contests. It is of some interest that the House of Representatives "generally follows State law and the rulings of State courts in resolving election contests, . . ." See H. R. Rep. No. 513, 87th Cong., 1st Sess. 42 (1961). It would seem likely that the Senate would also rely on state practice. Indeed, I would expect the recount procedure, in contrast to making the final judgment in a contest, to be treated as part of the "Manner of holding Elections" covered by Section 4 of Article I. See U. S. Const., Art. I, Sec. 4.

APPENDIX B.

ORDER GRANTING INTERLOCUTORY INJUNCTION.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division.

VANCE HARTKE, *Plaintiff*,
vs.
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER, *Defendants*,
THEODORE SENDAK, Attorney General of Indiana, *Intervening Defendant*.
No. IP 70-C-694

PRELIMINARY INJUNCTION.

This cause was heard before a three-judge District Court convened pursuant to 28 U. S. C. § 2284, on plaintiff's application for a preliminary injunction to enjoin the operation and enforcement of Chapter 54 of Title 29 of the Indiana Election Code, Burns Ind. Stat. Ann. § 29-5401 through § 29-5417, upon the ground that the application and operation of such statutes in respect to an election for the office of United States Senator is unconstitutional.

The Court having heard the evidence, and having considered the briefs and oral arguments of counsel, and it appearing to a majority of the Court after due deliberation that the defendant Richard L. Roudebush has sought and will continue to seek a recount of the votes cast in certain counties of the State of Indiana in the general election of November 3, 1970, for the office of United States Senator for the State of Indiana, if not enjoined from so doing, and it further appearing that the defendants Samuel J. Walker, John R. Hammond, and Duge Butler will proceed to recount the votes cast for said office at said election in certain precincts of Marion County, Indiana, if not so enjoined; and a majority of the Court having made and filed its written opinion holding said statute to be unconstitutional with respect to such office, and finding that for said defendants to proceed with a purported recount in Marion County, Indiana, or elsewhere, would work irreparable injury to the plaintiff in that such action would compromise the integrity of the ballots, tally sheets, voting machines, and other paraphernalia of the election upon which plaintiff must rely to justify his certification of election to such office, in the event the defendant Richard L. Roudebush contests the same before the United States Senate, as he threatens to do, it is therefore

ORDERED, that the defendants Richard L. Roudebush, Samuel J. Walker, John R. Hammond, Duge Butler and their officers, agents, servants, employees and attorneys and all those in active concert or participation with them, be and they are each hereby restrained and enjoined from taking any action whatsoever under and pursuant to the provisions of Burns Ind. Stat. Ann. § 29-5401 through § 29-5417 to conduct a recount for the office of United States Senator for the State of Indiana in Marion County, Indiana, or elsewhere, pending the determination of this action; provided, that plaintiff first give security in the sum of

$5,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, such bond to be approved by the court or by the Clerk of the court;

IT IS FURTHER ORDERED, that the United States Marshal serve a copy of this preliminary injunction upon each of said defendants and make his due return hereon.

Dated this 19th day of December, 1970, but effective as of December 17, 1970, at 5:45 P. M., pursuant to the oral announcement of the court's decision and order at the conclusion of the hearing on the prayer for a preliminary injunction.

/s/ WILLIAM E. STECKLER,
William E. Steckler,
/s/ S. HUGH DILLIN,
S. Hugh Dillin,
Judges, United States District Court.

APPENDIX C.

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division.

(FILED
U. S. District Court, Indianapolis Division
DEC 18 10:17 AM '70
Southern District of Indiana
Arthur J. Beck Clerk.)

VANCE HARTKE,
Plaintiff,
vs.
RICHARD L. ROUDEBUSH, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER,
Defendants.

No. IP 70-C-694

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Notice is hereby given that defendant, Richard L. Roudebush hereby appeals to the Supreme Court of the United States from the order granting an interlocutory injunction entered in this action on December 17, 1970.

This appeal is taken pursuant to 28 U. S. C. § 1253.

/s/ JOHN G. TINDER,
John G. Tinder,
620 Union Federal Building,
Indianapolis, Indiana 46204,

/s/ DONALD A. SCHABEL,
Donald A. Schabel,
111 Monument Circle,
Indianapolis, Indiana 46204,
Attorneys for defendant Richard L. Roudebush.

CERTIFICATE OF SERVICE.

The undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that copies of the foregoing notice of appeal were served upon John J. Dillon, Suite 711, 120 East Market Street, Indianapolis, Indiana 46204, David W. Mernitz, 710 Guaranty Building, Indianapolis, Indiana, and James L. Tuohy, 301 Circle Tower Building, Indianapolis, Indiana 46204, attorneys for the plaintiff, and on Theodore L. Sendak, Attorney General, 219 State House, Indianapolis, Indiana 46204, intervening defendant, by delivery to such persons at their respective offices, and by mailing copies to Samuel Walker, 1604 East LeGrande Ave., Indianapolis, Indiana, John R. Hammond, 431 East Hanna Avenue, Indianapolis, Indiana, and to Duge Butler, 156 East Market Street, Room 400, Indianapolis, Indiana, defendants, this 18th day of December, 1970.

/s/ DONALD A. SCHABEL,
Donald A. Schabel.

APPENDIX D.

STATUTE INVOLVED—INDIANA ELECTION CODE.

Article 27—Recounting the Vote.

29-5401. Elections—Right of candidate to recount of votes.—Any candidate for any public office voted upon at any election held within the state of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the condition and in the manner and with the effect as in this article [§§ 29-5401—29-5417] provided. [Acts 1945, ch. 208, § 324, p. 680.]

29.5402. Right of recount—Candidates entitled—Application to voting precincts.—The right of recount provided in this article [§§ 29-5401—29-5417] shall be available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipal, county, district, judicial, legislative, and state elective office and candidates for membership in the house of representatives and in the senate of the United States; and such right of recount may by any candidate be exercised with respect to one [1] or several or all of the voting precincts in which votes were cast for the office for which he was a candidate. [Acts 1945, ch. 208, § 325, p. 680.]

29-5403. Petition for recount—Verification—Filing—Cross-petition by candidate elected—Time in which cross-

petition must be filed.—The candidate desiring a recount of votes shall file a verified petition or petitions therefor, as the case may be, in the circuit or in a superior court of the county or counties in which is located or are located the voting precinct or precincts in which he desires a recount of the votes cast for the office for which he or she was a candidate at such election, or before the judge of any such court in vacation and each such petition shall specify the voting precinct or precincts within the county in which the petition is filed in which such recount is desired; such petitions for the recount of votes cast at an election shall be filed within fifteen [15] days after the day on which such election was held: Provided, That any candidate, who, on the face of the election returns is elected to any office at such election, shall be permitted to file a cross-petition or cross-petitions for a recount within twenty-five [25] days after the day on which said election is held and each such cross-petition shall specify the voting precinct or precincts within the county in which the cross-petition is filed in which such recount is desired. If a petition for recount is filed for an office for which voters in more than one county vote a cross-petition for a recount may be filed in a county or counties in addition to the one in which the first petition was filed: Provided, That such cross-petition or cross-petitions for a recount shall be filed within twenty-five [25] days after the day on which said election is held and that such cross-petition or cross-petitions shall ask for a recount of all votes cast for such office in the second or more counties; Provided, further, That in the case of a state-wide elective office, if more than two [2] counties are involved through petition or cross-petition, the petitioner and cross-petitioner shall each bear ten per cent [10] of the costs occasioned by the recount and the remainder of said cost shall be appropriated and paid from the general fund as other expenditures of the state of

Indiana, notwithstanding any other provisions of the Acts of 1945, chapter 208. If on either such day the court shall be in vacation the petition or cross-petition shall be deemed duly filed in time if filed in the office of the clerk of the court, but no such petition shall be granted and no recount ordered until after such twenty-fifth day following such election unless the defendant or defendants to the petition or petitions file a written waiver or waivers of their right to file a cross-petition or cross-petitions as provided in this article [§§ 29-5401—29-5417]: Provided, further, That the filing of a cross-petition is discretionary and not obligatory and failure to file either a cross-petition or an answer shall not be construed as an admission of the truth of the allegations of the petition for a recount nor shall it give rise to any presumption in favor thereof. [Acts 1945, ch. 208, § 326, p. 680; 1961, ch. 313, § 2, p. 861.].

29-5404. Candidates may join in petition for recount—Consolidation of petitions for recount.—Two [2] or more candidates for the same or different offices voted upon at the same election may join in such petition or petitions for recount. If more than one [1] petition for recount is filed in any county within fifteen [15] days following an election, whether in the same court of such county or not, such petitions shall be ordered consolidated under the petition first filed, and if a transfer of petitions from one court of such county to another court of such county is necessary to effect such consolidation such transfer shall on motion be ordered by the court in which the subsequent petition or petitions were filed, or the judge thereof in vacation. [Acts 1945, ch. 208, § 327, p. 680.]

29-5405. Petition for recount—Contents—Term "contest" defined—Amendment of petition.—Each such petition shall state the office and the precinct or precincts within the county in respect of which the petitioner desires a recount; that he was a candidate at such election for such

office and that the office was voted upon in the precinct or precincts specified; the name and post-office address of petitioner's opposing candidate or candidates; that the petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that the petitioner desires to contest said election in respect of said office, or that the petitioner desires to prepare for a contest in respect of such office which he has reason to believe will be instituted against him; and that he desires a recount of all of the votes cast for such office in such precinct or precincts. The term "contest" as used in this section shall includes all forms of contest herein or hereafter recognized as appropriate means for contesting title to a public office. The court in which such petition is filed or the judge thereof in vacation may allow such petition to be amended at any time upon such terms and conditions as the court or judge may order. [Acts 1945, ch. 208, § 328, p. 680.]

29-5406. Cross-petition—Contents—Amendment of cross-petition.—Each such cross-petition shall state the office and the precinct or precincts within the county in respect of which the cross-petitioner desires a recount; that he was a candidate at such election for such office and that the office was voted upon in the precinct or precincts specified; the name and post-office address of the cross-petitioner's opposing candidate or candidates; that the cross-petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that he desires a recount of all of the votes cast for such office in such precinct or precincts. The court in which such cross-petition is filed or the judge thereof in vacation may allow such cross-petition to be amended at any time upon such terms and conditions as the court or judge may order. [Acts 1945, ch. 208, § 329, p. 680.]

29-5407. Notice of filing and pendency of petition—Duty of clerk to issue notice—Duty of sheriff.—Upon the filing of such petition, the clerk shall issue a notice of such filing and pendency of such petition to the opposing candidate or candidates and deliver the same to the sheriff or sheriffs of the county or counties in which such opposing candidate or candidates reside; and said sheriff or sheriffs shall immediately serve the same upon such opposing candidate or candidates in person or by leaving a copy at his or their last and usual place of residence and shall make immediate return of such service. [Acts 1945, ch. 208, § 330, p. 680.]

29-5408. Bond for payment of costs.—Each petitioner shall furnish a cash deposit or file an undertaking with corporate surety to the approval of the court for the payment of all costs of such recount, the minimum amount of which shall be one hundred [$100] dollars. Should the number of precincts to be counted exceed ten [10], the amount of the deposit or bond, as the case may be, shall be increased by ten dollars [$10] for each and every precinct in excess of ten [10]. Any unexpended balance remaining in any deposit after payment of all the costs occasioned by the recount proceedings shall be returned to the depositor: Provided, That where the petition is joint a joint undertaking may be furnished: Provided, however, That in the event a cross-petition is filed then the petitioner or petitioners and the cross-petitioner or cross-petitioners shall either furnish cash deposits or file undertakings with corporate surety to the approval of the court for the payment of his or their proportionate share of the cost of such recount as hereinafter provided: Provided, That where the cross-petition is joint a joint undertaking may be furnished. [Acts 1945, ch. 208, § 331, p. 680.]

29-5409. Granting petition and cross-petition.—Appointment of recount commission.—Upon the filing of such petition and undertaking, the court or the judge thereof in

vacation shall, upon the expiration of twenty-five [25] days after such election and upon proof of service of said notice or notices, grant such petition and cross-petition or cross-petitions as may have been filed and order the recount of such votes in such precinct or precincts, and if there is a consolidation of such petitions and cross-petitions, the court shall by consolidated order grant such consolidated petitions and cross-petitions and shall order a consolidated recount of all votes in all precincts in such county specified and requested in such petitions and cross-petitions. In either case the court or the judge thereof in vacation shall appoint a recount commission of three [3] members to make the recount or recounts ordered, and the commission shall in the same process recount all of the votes ordered recounted. [Acts 1945, ch. 208, § 332, p. 680.]

29-5410. Recount commission—Qualifications of members—Compensation.—If any of the votes to be recounted were cast by means of voting machines, one [1] member of the recount commission shall be a competent mechanic who is familiar with such voting machines. All of such commissioners shall be voters, qualified to vote at such election and two [2] of such commissioners shall be selected from the two [2] opposite political parties which cast the highest and next highest votes in this state for secretary of state at the last preceding general election. Each member of the commission shall receive ten dollars [$10.00] for each day while actually engaged in making such recount. The cost of such recount shall be paid by each petitioner or cross-petitioner, as hereinafter provided. [Acts 1945, ch. 208, § 333, p. 680.]

29-5411. Duty of commission—Watchers—Representatives of press entitled to attend.—On a day, not sooner than five [5] days after the recount is ordered, and at a place to be fixed by order of the court, such commission shall convene and commence such recount and shall expeditiously

complete the same. Each candidate affected by such recount shall be entitled to have a watcher present at such recount and shall himself have the right to be present. Representatives of the press shall also be entitled to attend such recount [Acts 1945, ch. 208, § 334, p. 680.]

29-5412. Duty of clerk when order of recount is made and entered by court.—On the day when the order of recount is made and entered by the court, the clerk of the circuit court shall, by registered United States mail, mail a certified copy of such order to each opposing candidate named in such petition at the address therein given, and shall tax the cost thereof to the petitioner. [Acts 1945, ch. 208, § 335, p. 680.]

29-5413. Protection of ballots, voting machines, tally sheets and other papers—Duty of court.—The court shall by order impound, and provide for the protection of all ballots and voting machines used at such election for casting votes for such office or offices in such precinct or precincts, together with all tally sheets relating thereto and all lists of the names and addresses of all persons registered by the clerk as having voted for such office or offices, and shall make the same available to said recount commission or to any contest commission appointed pursuant to section 351 [§ 29-5603] (a) (b) and (c) of this act [chs. 28-60 of this title]. [Acts 1945, ch. 208, § 336, p. 680; 1961, ch. 313, § 3, p. 861.]

29-5414. Completion of recount—Certificate of commission—Filing—Duty of clerk—Effect of certificate—Procedure when recount for office of governor, lieutenant-governor, and members of general assembly.—When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the

highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court.

Except for the offices of governor, lieutenant-governor, and members of the general assembly, such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such recount certificates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any contest or other preceeding [proceeding] in which there is an issue as to the votes cast at such election for such office or offices.

Upon a recount for the office of governor or lieutenant-governor, each clerk of the circuit court shall, on the day following the completion of the recount, make out, at full length, two [2] certified statements, under the seal of the clerk of the circuit court, of the number of votes each candidate received; one [1] of which he shall transmit to the speaker of the house of representatives of the next general assembly, by its senator or representative, who shall deliver the same to such speaker on the first day of the session and the other certified statement shall be transmitted by registered mail to Indianapolis, directed to said speaker, and to the care of the secretary of state, by whom the same shall be delivered to the speaker on the first day of the session.

If a recount is had in respect to votes cast for senator or representative in the general assembly, each clerk of the circuit court, on the day following the completion of the recount, shall make and certify two [2] statements showing the total number of votes each candidate received; he shall transmit one [1] such certified statement to the person having the highest number of votes for senator or representative, and shall transmit one [1] certified statement

to the presiding officer of the house in which the successful candidate is to be seated, directed to the care of the secretary of state, by whom the same shall be delivered to the said presiding officer on the first day of the next session of the general assembly. The said certified statement shall be referred by such presiding officer for such action as that body may find appropriate: Provided, however, That when two [2] or more counties compose a district to elect a senator or representative, the clerks of such counties shall meet on Wednesday next following the day such recount is completed between the hours of one [1] and six [6] of the afternoon, at the courthouse of the oldest county in such district, where they shall compare the recount certificates filed with them and shall jointly make out and certify two [2] statements showing the total number of votes each candidate received and shall transmit the same as provided herein.

The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted as herein provided for the purpose of referring the information therein contained to the appropriate authorities. [Acts 1945, ch. 208, § 337, p. 680; 1961, ch. 313, § 4, p. 861.]

29-5415. Recount in respect to office for which votes were cast in all voting precincts of state—Duty of clerk to certify recount vote to secretary of state—Duty of secretary of state.—If a recount is had in respect to an office for which votes were cast in all voting precincts of the state, except governor and lieutenant-governor, or in more than one [1] county, except members of the general assembly, the clerk of the circuit court where such recount was had shall determine whether the votes as shown by such recount certificates differ from the votes in such precinct or precincts as the same had been returned to, and tabulated by

the county canvassing board, and if he finds there is such difference he shall make his certificate showing the total vote in such county for such office for each candidate as corrected in accordance with the votes shown by such recount certificate and shall forthwith transmit the same to the secretary of state who then shall tabulate the vote for such office from such county in accordance with such certificate from such clerk; and if the secretary of state shall previously have included in his tabulations votes cast for such office as returned by such county canvassing board he shall correct such tabulation, in accordance with such certificate from such clerk and the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office. [Acts 1945, ch. 208, § 338, p. 680; 1961, ch. 313, § 5, p. 861.]

29-5416. Recount in respect to office voted upon in single county, city or smaller unit—Duty of clerk.—If the office in respect to which such recount is had was voted upon only in a single county, except members of the general assembly, city, or smaller unit, then the clerk of the circuit court shall determine whether the total tabulation of all votes for such office as made by the county canvassing board authorized to make such total tabulation is affected by the results of such recount as shown by such recount certificate, and if it is, then such clerk shall make his certificate showing the correct total vote for such office in accordance with such recount certificate and shall transmit such certificate to the county election board or such other officer as may be authorized by this act [chs. 28-60 of this title] to issue a certificate of election or commission for such office; and the candidate shown by such certificate of the clerk to have received the highest number of votes for such office shall

be entitled to a certificate of election or commission for such office, notwithstanding one may have been issued upon a previous return or certificate of the total votes cast for such office. [Acts 1945, ch. 208, § 339, p. 680; 1961, ch. 313, § 6, p. 861.]

29-5417. Payment of costs of recount—Time.—In those cases in which no cash deposit is made as provided in section three hundred and thirty-one [§ 29-5408], the petitioner or petitioners shall pay all of the costs occasioned by the recount to the clerk of the circuit court within ten [10] days after the recount has been finally completed: Provided, however, That in the event a cross-petition or cross-petitions are filed then the party or parties filing such cross-petition or cross-petitions shall pay to the clerk of the circuit court of the county in which such recount is had within ten [10] days after the recount is completed all of the costs occasioned by the recount of votes in the precinct or precincts which have been designated in his or their respective cross-petition or cross-petitions and the petitioner or petitioners shall be relieved of these costs of the recount. [Acts 1945, ch. 208, § 340, p. 680.]

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Supreme Court, U.S.
FILED
JAN 15 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

NO. [redacted]

THEODORE L. SENDAK
Attorney General of the
State of Indiana,

Appellant,

v.

R. VANCE HARTKE,
(Plaintiff Below)
RICHARD L. ROUDEBUSH
SAMUEL WALKER
JOHN R. HAMMOND
DUGE BUTLER
(Defendants Below) *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

JURISDICTIONAL STATEMENT

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R. VANCE HARTKE,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, entered on December 17, 1970, granting Appellee a preliminary injunction which continued in full force the *ex parte* temporary restraining order entered by the District Court on December 3, 1970, enjoining any action to conduct a recount in the election for the office of United States Senator for the

State of Indiana. Appellants submit this statement to show that this Court has jurisdiction of the appeal and that a truly substantial question is presented.

OPINION BELOW

The opinion of the District Court is unreported. The decision, and opinion, of the court is appended to this Statement at p. A-1.

JURISDICTION

This action for injunctive relief was brought in the District Court on December 3, 1970, pursuant to 28 U.S.C. § 1343(3) to enjoin the holding of an election recount on the ground that the Indiana election recount statutes were in conflict with the United States Constitution. The three judge panel entered its order December 17, 1970, continuing in full force an earlier temporary restraining order granted by the District Court December 3, 1970 which enjoined the conduct of the recount. Appellant's Notice of Appeal was filed December 18, 1970 in the District Court, Indianapolis. The Notice of Appeal is appended at p. A-22. This Court has jurisdiction of this appeal under 28 U.S.C. § 1253.

The Attorney General of Indiana was granted leave to intervene as a party defendant by the District Court on December 15, 1970. See Appendix, p. A-21. Indiana law requires the Attorney General to appear and defend the constitutionality of Indiana statutes when attacked on constitutional grounds. Acts of 1889, ch. 71, § 4; Acts of 1921, ch. 85, § 2, the same being Burns' Indiana Statutes (1964 Repl.) § 49-1902 and Acts of 1927, ch. 81, § 11, being Burns' (1968 Repl.) § 3-1111. Federal law also recognizes the propriety of the Attorney General

appearing to defend the constitutionality of state statutes when challenged. 28 U.S.C. 2284(2).

The statutes attacked as unconstitutional in this case are those included under the Indiana Election Code involving the right to recount, Acts of 1945, ch. 208, §§ 324-340, being Burns' (1969 Repl.) §§ 29-5401-5417. Generally this election code provides:

> "Any candidate for any public office voted upon at any election held within the State of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the conditions and in the manner and with the effect as in this article provided." Acts 1945, ch. 208, § 324; Burns' § 29-5401.

The right to a recount is available to all candidates:

> "The right of recount provided in this article [§§ 29-5401—29-5417] shall be available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipal, county, district, judicial, legislative, and state elective office and candidates for membership in the house of representatives and in the senate of the United States; and such right of recount may by any candidate be exercised with respect to one [1] or several or all of the voting precincts in which votes were cast for the office for which he was a candidate." Acts 1945, ch. 208, § 325, p. 680.

The entire recount statute is set out at p. A-25 of the Appendix.

The most relevant part is § 29-5414, which provides the effect of a recount:

"When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court.

Except for the offices of governor, lieutenant-governor, and members of the general assembly, such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such recount certificates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any contest or other preceeding [proceeding] in which there is an issue as to the votes cast at such election for such office or offices.

The 1961 amendment to § 5414 provides:

"The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted as herein provided for the purpose of referring the information therein contained to the appropriate authorities. [Acts 1945, ch. 208, § 337, p. 680; 1961, ch. 313, § 4, p. 861.]"

The United States Constitution provides that

"Each house shall be the judge of the elections, returns and qualifications of its members. . ." Article I, Section 5.

QUESTIONS PRESENTED

1. Whether the District Court had the power to enjoin the proceeding in the state court.

2. Whether the Indiana Election Code providing for a recount in elections for the office of United States Senator conflicts with the constitution prerogative of the Senate to judge the election of its members, thereby prohibiting a recount in this case.

STATEMENT OF THE CASE

On November 3, 1970, an election was held in the State of Indiana for the office of United States Senator. It was the closest senatorial election in Indiana history. The reported plurality was about one vote per precinct statewide. (4,482 votes; 4,440 precincts). Candidate Richard L. Roudebush petitioned the Marion County Superior Court for a recount in various enumerated precincts. Defendant R. Vance Hartke moved to dismiss Roudebush's petition, but the motion was denied and the petition for a recount of the votes was granted.

Appellee Hartke then filed in the District Court his Complaint for Injunctive Relief and Application for Temporary Restraining Order seeking to restrain operation of the recount statutes on the ground that they were in conflict with Article I, Section 5 of the United States Constitution. The same day Appellee's action in the District Court was filed, December 3, 1970, the judge granted the Temporary Restraining Order enjoining the defendant members of the recount commission from further proceeding.

On December 14, 1970, the Attorney General of Indiana moved to intervene as a party defendant pursuant to F.R.C.P. 24 in order to defend the constitutionality of the Indiana Election Code recount provisions. The Attorney General also moved the District Court to dismiss Appellee's complaint. On December 15, 1970, the District

Court granted the Attorney General's motion to intervene as a party defendant.

On December 17, 1970, the District Court three judge panel convened to hear Appellee's application for injunction based upon the unconstitutionality of the Indiana election recount statutes. The District Court determined the statutes to be unconstitutional with respect to the office of United States Senator. The District Court further found that to proceed with a recount "would work irreparable injury to the Plaintiff in that such action would compromise the integrity of the ballots, tally sheets, voting machines, and other paraphernalia of the election . . ." and ordered that the defendants and all those in active concert with them be enjoined from taking any action whatsoever pursuant to the provisions of Burns' Ind. Stat. Ann. § 29-5401 to § 29-5417 to conduct a recount. Appendix, p. A-2.

The Attorney General petitioned the district Court to stay its interlocutory order but was denied December 18, 1970. He then applied to this Court for a stay of the District Court order on December 18, 1970. This application was denied.

THE QUESTION PRESENTED IS A SUBSTANTIAL FEDERAL QUESTION

The legal issues involved in this case are truly substantial because the prerogatives of the United States Senate and the right of the State of Indiana to regulate its elections are involved. This case involves substantial questions of federal-state relations in the conduct of elections for Congress. The outcome of this case will decide which contestant shall be awarded a seat in the United States Senate. But the legal issues are of equal importance

and may well affect future Congressional elections in Indiana and other states where the voters show themselves to be so closely divided.

The first claim of Appellants is that 28 U.S.C. § 2283 prohibited the District Court from granting injunctive relief to Appellee. The District Court erred in granting injunctive relief interfering with the proceeding in the Marion County Superior Court. The injunction restraining the operation of the recount statutes was granted in contravention of 28 U.S.C. § 2283 which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments".

Despite the mandatory language, the district Court found this statute to be "a statutory adoption of the doctrine of comity and hence discretionary in its application". Citing *Baines v. City of Danville* (4 Cir. 1964) 337 F2d 579, the court said that "special circumstances" justifying relief would not prevent a federal court from enjoining state court proceedings, despite what the court acknowledged as the "absolute" language of § 2283. In *Baines,* Judge Haynsworth offered a thorough discussion of the past scope of § 2283. His discussion noted that § 2283 was derived from the Act of March 2, 1793, 1 Stat. 335, which simply provided that no injunctions should issue from federal courts to stay proceedings in any state court. In 1948, it was amended with the provision for the three exceptions to its operation. In *Amalgamated Clothing Workers of America v. Richman Brothers Co.* 348 U.S. 511, 514, 75 S. Ct. 452, 99 L. Ed. 600, (1955) the Supreme Court said "(b)y that enactment [the revision which is now § 2283], Congress made clear beyond

cavil that the prohibition is not to be whittled away by judicial improvisation". In *Baines,* the Court of Appeals said:

> "In every case before the Supreme Court in which federal interference with state court proceedings has been premised upon asserted denials of civil rights, the Supreme Court has required or sanctioned federal forbearance. It has usually done so on the basis of considerations of equity and comity fashioned by it, but which are identical with those which underlie the statute. If judicial principles of equity and comity prevent federal stay of criminal proceedings in a state court, it is difficult to see how an unqualified congressional command to the same end can be ignored". 337 F2d at p. 591.

In *Baines,* the court carefully decided that 42 U.S.C. § 1983, the civil rights statute, which provided for injunctive relief, did not make an exception to § 2283. Yet, reversing the tenor of its preliminary discussion, the Fourth Circuit, at headnote 14, commenced to fashion its rule that § 2283 is inapplicable in cases where an injunction against state court proceedings is the only means of avoiding "grave and irreparable injury". This conclusion was buttressed by a theory of expedience: "Judically fashioned rules are more malleable". 337 F2d at p. 593. However, upon the facts in that case the Fourth Circuit held that injunctive interference with the state court proceedings was not warranted.

Baines is readily distinguishable from this case, for *Baines* involved a violation of the First Amendment rights of the Negro plaintiffs. The instant case involved no claim under the Civil Rights Act.

While § 2283 does not bar federal injunctions against the *institution* of state court proceedings, *Dombrowski*

v. Pfister, 380 U.S. 479, 85 S. Ct. 116, 14 L. Ed. 2d 22 (1965), it bars all stays of proceedings already instituted unless one of the three statutory exceptions applies. The first exception in § 2283 is for cases where Congress has expressly authorized the federal courts to enjoin state court proceedings. But the Plaintiff here does not claim under any Congressional authority to enjoin state court proceedings. (Therefore cases using 42 U.S.C. § 1983 to carve out exceptions to § 2283 are not in point.) He is not proceeding under the Bankruptcy Act, in habeas corpus, or in removal. He seeks no injunction "Expressly authorized by Act of Congress". His only claim to jurisdiction is under 28 U.S.C. § 1343 (3) which provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • •
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; • • •"

This statute does not provide Plaintiff with an express authorization for the injunction. Nor is Plaintiff able to bring himself within the second exception allowing injunctions "where necessary in aid of [the federal court's] jurisdiction". The final exception in § 2283 permits federal injunctions against state court proceedings "to protect or effectuate its judgments". There has been no judgment justifying protection and conferring injunctive powers in this case. Thus, none of the statutory exceptions to § 2283 is available to Plaintiff. The District Court's avoidance of § 2283 is justifiable only upon its

theory that "special circumstances justify such relief . . ." Here there is no such justification at all.

The District Court clearly adopted the "special circumstances" test as to whether § 2283 should be avoided. The court rejected the theory of *Cooper v. Hutchinson*, 184 F2d 119 (3 Cir. 1950), that 42 U.S.C. § 1983 created an exception to § 2283 in granting the injunctive power to federal courts in civil rights cases. The *Baines* Case is the only authority cited by the District Court for its "special circumstances" test of the applicability of § 2283.

The District Court stated that abstention would not be proper where the state statute was clearly unconstitutional and incapable of a limiting construction. It cited *Harman v. Forsevius*, 380 U.S. 528, 85 S. Ct. 1177, 14 L. Ed. 2d 50, *Baggett v. Bullitt*, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 and others. But none of these cases involved § 2283 and its anti-injunctive imperatives. The cases cited were appropriate where abstention, as a general desideratum, was purely discretionary and not compelled, as here, by an act of Congress. The cases are inapposite here, because the abstention of the District Court is compelled by statute. In the cases cited, no pending state court proceeding was enjoined. Bereft of these cases not involving § 2283 and bereft of the *Baines* case, which involved a Civil Rights Act claim, the District Court's decision is an unsupportable extension of federal jurisdiction.

Appellant submits that if "special circumstances" can be considered an appropriate test for the circumvention of § 2283, that Congressional enactment has been rendered a practical nullity. Such an aggrandizing attitude towards federal jurisdiction must have as its basis a fundamental

distrust of the ability of state courts to adjudicate fairly federal constitutional issues. The vitality of federalism should not be permitted to be eroded by such flimsy justifications as "special circumstances", especially in cases where no First Amendment rights are involved.

In *Amalgamated Clothing Workers of America v. The Richman Brothers*, 348 U.S. 511, 75 S. Ct. 452, the Supreme Court considered a case where an employer had brought an action in a state court against a union which had been picketing its business outlets. The union then sought an injunction in a federal court to prevent the employer from pursuing his remedy in the state court, claiming that the state court had no jurisdiction over the labor dispute. The Supreme Court, assuming that the state court had no jurisdiction, held that a federal injunction was prohibited by § 2283. It had been argued that § 2283 was inapplicable whenever it appeared that the state court was wholly without jurisdiction to proceed, the field having been pre-empted by Congress. (This contention parallels the District Court's theory of "special circumstances" nullifying § 2283.) To this theory the Supreme Court replied:

> "This is not a statute conveying a broad general policy for appropriate *ad hoc* appliction. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions". 348 U.S. 515, 75 S. Ct. 455.

Against this clearly imperative language of the Supreme Court, the District Court in this case countered with the view that § 2283 was "discretionary in its application".

Subsequent to *Amalgamated*, this Court held in *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 116, 14 L. Ed.

2d 22 (1965) that it was proper for a federal court to enjoin the bringing of a state court proceeding where the threatened prosecution of the criminal statute would have a "chilling effect" on free speech, which would constitute an irreparable injury to the plaintiff. But *Dombrowski* did not involve § 2283 because the state court proceeding was enjoined before it had even begun, and § 2283 prohibits only injunctions against pending state court proceedings. Because § 2283 was not applicable in *Dombrowski*, that case is of no aid to Plaintiff here.

Following *Dombrowski*, several lower Federal courts have held that federal injunctive relief is warranted even where state court proceedings are pending *if* First Amendment rights are involved. Before it can be said that "special circumstances" exist which would enable a federal court to avoid § 2283, First Amendment rights must be involved. Moreover, the institution of the state court proceeding must be for the designed purpose of "chilling the First Amendment right". See eg., *Landry v. Daley*, 288 F. Supp., 200 (N.D. Ill. 1968) Federal intervention is not justified unless it is shown that enforcement of the state statute is being carried out in bad faith to harass an individual's exercise of protected freedoms. *Cameron v. Johnson* 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968); *Landry v. Daley, supra.* In *Cameron*, this Court said:

> "Appellants case that there are 'special circumstances' establishing irreparable injury sufficient to justify federal intervention must therefore come down to the proposition that the statute was enforced against them, not because the Mississippi officials in good faith regarded the picketing as violating the statute, but in bad faith as harassing appellants' exercise of protected expression with no intention of pressing the charges or with no expectation of obtain-

> ing convictions, knowing that appellants' conduct did not violate the statute. We agree with the District Court that the record does not establish the bad faith charged. This is therefore not a case in which '. . . a federal court of equity by withdrawing the determination of guilty from the state courts could rightly afford (Appellants) any protection which they could not secure by prompt trial and appeal pursued to this Court'. *Douglas v. City of Jeanette*, 319 U.S. at 164, 63 S. Ct. at 881"; 390 U.S. at 619, 88 S. Ct. at 1340.

There has been no allegation of bad faith in the attempted recount procedure, nor could there be. There has been no allegation of a denial of First Amendment rights. There is no way § 2283 can be avoided under the facts of this case. The facts of this case do not constitute a *Dombrowski* exigency.

Dombrowski involved the right of free expression—a right "of transcendent value to all society, and not merely to those exercising their rights . . ." 380 U.S. at 486. No such right of transcendent value is here involved. What is involved here is the right to discovery under the Indiana recount law to verify the vote count in an election conducted under Indiana law.

The terms of § 2283 themselves provide for three exceptions to its prohibitions. *Dombrowski* attempted to carve out another exception for threatened "chilling effects" upon First Amendment rights of expression. Since Plaintiff is unable to invoke any of these exceptions, § 2283 bars the District Court's injunction. In the absence of a First Amendment issue, there are no "special circumstances" justifying evasion of § 2283.

The District Court expressed its belief that "(l)ike Humpty Dumpty, the seals on the ballots cannot be put

back together again, if once destroyed, hence the frequent reason given for abstention—that all can be made right through state appellate procedures—does not apply". Yet all can be made right through state appellate procedures.

> "The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the "gap" complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions. During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts." *Amalgamated*, 348 U.S. at 518, 75 S.Ct. at 456.

In addition to the state case law which the District Court said favored Plaintiff, the recount statute provides for the maintenance of the integrity of the ballots.

> "The court shall by order impound, and provide for the protection of all ballots and voting machines used at such election for casting votes for such office or offices in such precinct or precincts, together with all tally sheets relating thereto and all lists of the names and addresses of all persons registered by the clerk as having voted for such office or offices, and shall make the same available to said recount commission or to any contest commission appointed pursuant to section 351(a)(b) and (c) of this act." Acts

1945, ch. 208, § 336, amended, Burns' (1969 Repl.) § 29-5413.

The District Court's fear of an "invasion of the sanctity of the ballots" is unfounded. Such an invasion could occur on the first count if it could occur on the recount. In any event, as the next argument will point out, the Senate retains its prerogative as the final judge of the election. Recount is largely a discovery procedure. Plaintiff will not suffer irreparable harm of the *Dombrowski* genre by a simple recount of the votes. Absent "special circumstances", § 2283 bars the District Court injunction. *Hayes Industries Inc. v. Caribbean Sales Associates, Inc.* 387 F.2d 498 (1 Cir. 1968); *International Association of Machinists v. United Aircraft Corp.*, 333 F.2d 367 (2 Cir. 1964).

There is no reason why Plaintiff should not have pursued his remedy in the Indiana Supreme Court by writ of prohibition. The three Indiana cases cited by the District Court as supporting Plaintiff's case all involved applications for writs of prohibition. There is no reason why Plaintiff could not have done likewise and secured a speedy remedy in prohibition. In *Dombrowski*, federal intervention was premised upon facts where it was certain the Plaintiffs would not be able to vindicate their constitutional rights in the state courts. It was said:

> ". . . a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." 38 U.S. at 486, 88 S.Ct. at 1120.

But in the instant case, Plaintiff has a clear, quick remedy in the Indiana Supreme Court by writ of prohibition and claims ample state authority for his constitutional claim.

There is no basis for *Dombrowski* federal action in this case, as there has been no irreparable injury. In general, "(s)tate officers may be enjoined, but only in a case reasonably free from doubt, and only if irreparable injury would result from the acts sought to be restrained. . . . Injunction should not be granted where other adequate remedies are available." 1 Barron and Holtzoff, Federal Practice and Procedure, § 46, p. 236-7.

The injunction was improperly granted because Plaintiff has failed to state a claim justifying relief.

Plaintiff has stated before the District Court the analogy that if a recount is invalid as to elections for seats in the state legislature, it is also invalid for the office of United States Senator. Under this reasoning, the 1961 amendment to § 29-5414, which made the results of a recount effective only to refer information to the appropriate authorities in recounts for the general assembly, should also apply to recounts for the Senate. Under the amendment to § 5414, recounts for the Senate would be excepted the same as state legislature recounts and the results of the recount would be of informational value only. There is no way that such a provision can derogate from the prerogatives of the Senate. In any event the Senate will have the final decision in the matter, Under Article I, Section 5.

While Article I, Section 5 of the Constitution establishes each house as the judge of the elections of its members, Article I, Section 4 provides that "(t)he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof . . ." Appellants submit that the Indiana recount statute is a valid exercise of

the power of the States to provide for the manner of holding elections, as it has simply made a recount an integral part of the election process.

A recount can be on no different footing than the original count. If a recount is defective as a derogation of the Senate's prerogatives, so is the original count. Were such to be true, the Senate would have to appoint a large staff to conduct the original count of the votes on the theory that the original count was in derogation of its rights to be the judge of the elections of its members. But that is not the case. The original count is not considered as an infringment upon the Senate's right; neither should be the recount. Article I, Section 5 clearly vests the Senate with the last voice. All a recount can do is refine the vote tally to a more accurate figure. The Senate can make whatever use of the tally it so desires. A recount serves as an integral part of the counting of the ballots and is merely part of the "manner" of holding the election, as provided for in Article I, Section 4. Since the States have the power to certify the results of a congressional election in the first instance, there is no reason why States cannot supersede this certification with a more accurate tally of the votes.

This view has received recent support in *Blackburn v. Hall* 115 Ga.App. 235, 154 S.E.2d 392 (1967); *Wickersham v. State Election Board,* 357 P.2d 421, Okl., (1960) and *Odegard v. Olson,* 264 Minn. 439, 119 N.W.2d 717 (1963).

Of the three Indiana cases principally relied upon by the District Court, the first two, *State ex rel Acker et al v. Reeves,* 229 Ind. 126, 95 N.E.2d, 838 (1951) and *State ex rel Beaman v. Circuit Court of Pike County et al,* 229 Ind. 190, 96 N.E.2d 671 (1951) both concerned elec-

tions for the state legislature, not the Senate. Moreover, they were decided prior to the 1961 amendment to § 29-5414, the last paragraph particularly, which explicitly limited the office of the recount to that of an informative function and nothing more. The one case decided after the passage of the amendment, *State ex rel Batchelet v. Dekalb Circuit Court et al,* 248 Ind. 48, 229 N.E.2d 798 (1967) contained such a short opinion that it by no means affords the Plaintiff so much support as claimed by the District Court. Moreover, *Batchelet* dealt with a moot case; the legislator had already been seated by the Indiana Senate. Appellants submit that if the Indiana Supreme Court were to hear this case today it would rule for the recount in view of the *Blackburn, Wickersham* and *Odegard* cases.

It should also be noted that the conclusive effects claimed for *Acker* and *Beaman* are undercut by two cases decided the same year which held that the duties of the recount commission are ministerial and the certificate of the recount commission is not an adjudication of the title to the office. *State ex rel McCormick v. Knox Superior Court*, 229 Ind. 118, 95 N.E.2d 829 (1951). A recount is in the nature of a bill of discovery. *Brown v. Grzeskowiak* 230 Ind. 110, 101 N.E.2d 639 (1951).

A recount should be distinguished from an election contest proceeding, which is provided for by separate statute. See Burns' Anno. Stat. (1969 Repl.) § 29-5501-5617. An election contest proceeding is more in the nature of an adjudication of title to the office contested. The laws of Indiana which provide for election contests on the basis of irregularity, ineligibility, illegal votes, etc. exclude contests for Congressional seats. Burns' § 29-5601. Whatever the conflict between an election contest and

Article I, Section 5 may be, there is no conflict as to a mere recount proceeding. Yet the District Court opinion uses the terms interchangeably at pp. 6, 7, and 15, (A-10, A-18) which further demonstrates the desirability of having this question of state law decided by a state court.

To summarize, the District Court erred because it granted an injunction prohibited by 28 U.S.C. § 2283 in a case involving facts which do not pose an exception, either statutory or judge-fashioned, to that statute. The District Court further erred because it granted relief to a Plaintiff who stated no claim justifying relief: a recount is not in derogation of the prerogative of the Senate to judge the elections of its members.

CONCLUSION

Appellants submit that this appeal brings before this Court truly substantial federal questions which require plenary consideration with briefs on the merits and oral arguments, for their resolution.

Respectfully submitted,

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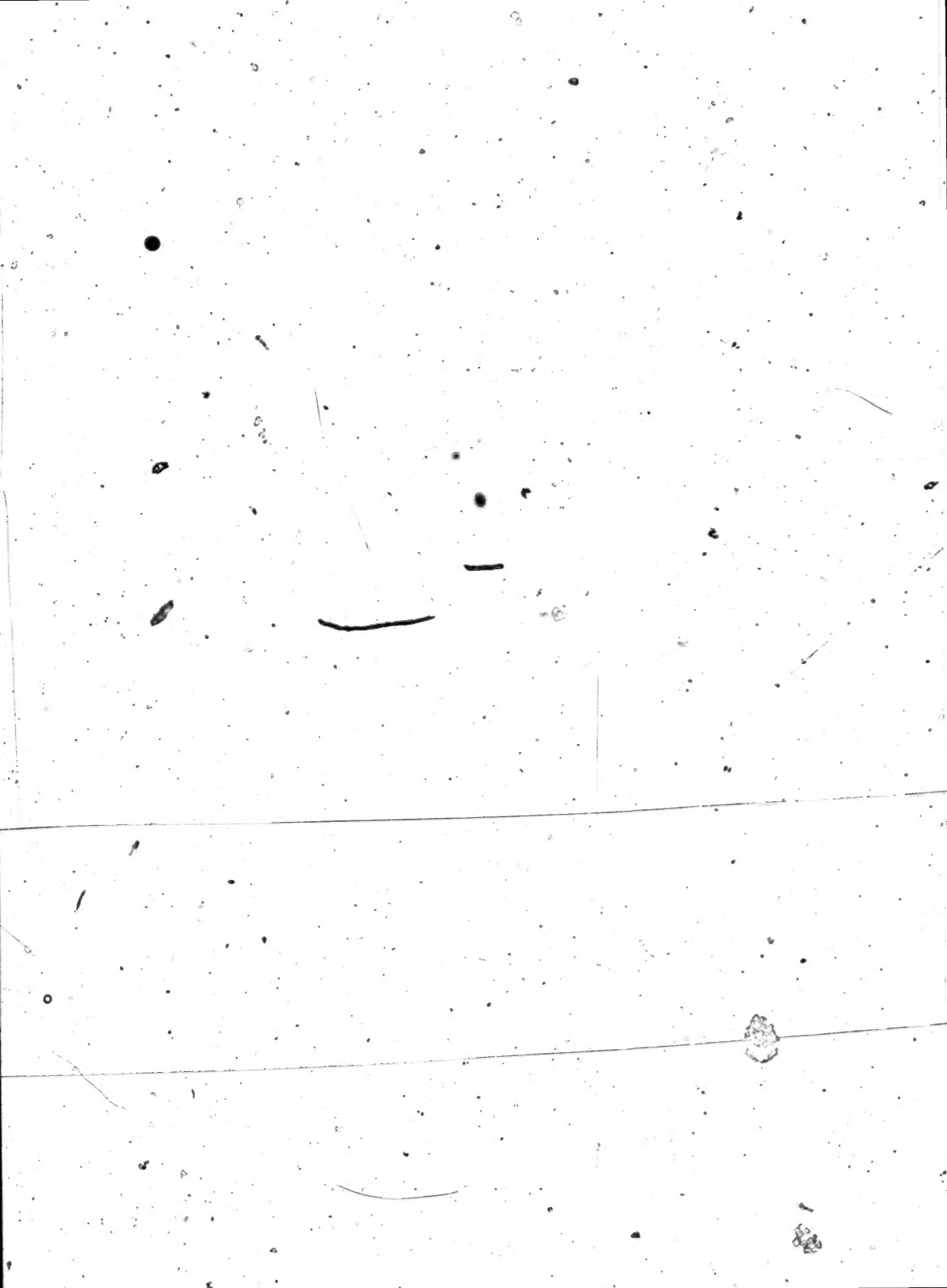

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
vs	)	NO. IP; 70-C-694
	)	
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants,	)	
	)	
THEODORE SENDAK, Attorney General of Indiana,	)	
	)	
Intervening Defendant.	)	

PRELIMINARY INJUNCTION

This cause was heard before a three-judge District Court convened pursuant to 28 U.S.C. § 2284, on plaintiff's application for a repliminary injunction to enjoin the operation and enforcement of Chapter 54 of Title 29 of the Indiana Election Code, Burns Ind. Stat. Ann. § 29-5401 through § 29-5417, upon the ground that the application and operation of such statutes in respect to an election for the office of United States Senator is unconstitutional.

The Court having heard the evidence, and having considered the briefs and oral arguments of counsel, and

it appearing to a majority of the Court after due deliberation that the defendant Richard L. Roudebush has sought and will continue to seek a recount of the votes cast in certain counties of the State of Indiana in the general election of November 3, 1970, for the office of United States Senator for the State of Indiana, if not enjoined from so doing, and it further appearing that the defendants Samuel J. Walker, John R. Hammond, and Duge Butler will proceed to recount the votes cast for said office at said election in certain precincts of Marion County, Indiana, if not so enjoined; and a majority of the Court having made and filed its written opinion holding said statute to be unconstitutional with respect to such office, and finding that for said defendants to proceed with a purported recount in Marion County, Indiana, or elsewhere, would work irreparable injury to the plaintiff in that such action would compromise the integrity of the ballots, tally sheets, voting machines, and other paraphernalia of the election upon which plaintiff must rely to justify his certification of election to such office, in the event the defendant Richard L. Roudebush contests the same before the United States Senate, as he threatens to do, it is therefore

ORDERED, that the defendants Richard L. Roudebush, Samuel J. Walker, John R. Hammond, Duge Butler and their officers, agents, servants, employees and attorneys and all those in active concert or participation with them, be and they are each hereby restrained and enjoined from taking any action whatsoever under and pursuant to the provisions of Burns Ind. Stat. Ann. § 29-5401 through § 29-5417 to conduct a recount for the office of United States Senator for the State of Indiana in marion County, Indiana, or elsewhere, pending the determination of this action; provided, that plaintiff first give security in the

sum of $5,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, such bond to be approved by the court or by the Clerk of the court;

IT IS FURTHER ORDERED, that the United States Marshal serve a copy of this preliminary injunction upon each of said defendants and make his due return hereon.

Dated this 19th day of December, 1970, but effective as of December 17, 1970, at 5:45 P. M., pursuant to the oral announcement of the court's decision and order at the conclusion of the hearing on the prayer for a preliminary injunction.

/s/ WILLIAM E. STECKLER
William E. Steckler

/s/ S. HUGH DILLIN
S. Hugh Dillin

Judges, United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE, Plaintiff,	)	
vs	)	NO. IP 70-C-694
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER, Defendants,	)	OPINION
THEODORE SENDAK, Attorney General of Indiana, Intervening Defendant.	)	

This cause was heard before a three-judge District Court convened pursuant to 28 U.S.C. § 2284, on plaintiff's application for a preliminary injunction to enjoin the operation and enforcement of Chapter 54 of Title 29 of the Indiana Election Code, Burns Ind. Stat. Ann. § 29-5401 through § 29-5417, upon the ground that the application and operation of such statutes in respect to an election for the office of United States Senator is unconstitutional.

At the general election of November 3, 1970, the plaintiff, Vance Hartke, an incumbent United States Senator for Indiana, and the defendant Richard L. Roudebush were opposing candidates for Hartke's office. The

canvass reflected that Hartke received the highest number of votes cast for such office, and on November 16, 1970, the Secretary of State certified him to the Governor of Indiana as duly elected and the Governor, on December 3, 1970, gave to said candidate a certificate of his election, in the form required by Burns Ind. Stat. Ann. § 29-5309.[1] The certificate has been filed with the Secretary of the United States Senate.

On November 17, 1970, defendant Roudebush filed in the Superior Court of Marion County, Indiana, a petition for a recount of the votes cast in selected precincts of Marion County, stating in said petition his desire to contest said election. This court knows judicially that similar petitions were filed by him in ten other counties of the State of Indiana. The Superior Court of Marion County overruled a motion to dismiss the petition, and proceeded to appoint the defendants Samuel J. Walker, John R. Hammond, and Duge Butler as a recount commission to recount the votes cast for the office of United States Senator in such selected precincts of Marion County, rely-

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1 Section 29-5309. "The secretary of state as soon as he shall receive such certified statements, shall compare and estimate the votes given for United States senator and for representative in congress, and certify to the governor the persons having the highest number of votes as duly elected; and the governor shall give to each of the persons returned to him as aforesaid a certificate of his election, sealed with the seal, and attested by the secretary of state: Provided, That no return of any county which has come into its hands, and which has been duly authenticated by the clerk of the circuit court thereof, under seal, as hereinbefore provided shall be rejected by said secretary of state, but he shall estimate, aggregate and tabulate, and report to the governor the total number of votes cast in each county for each candidate for state office, supreme judge or other officer to be elected by all the voters of the state, and members of congress, as evidenced by the face of such returns so certified to him."

ing upon the Indiana recount statute, Burns Ind. Stat. Ann. §§ 29-5401—29-5417, the pertinent parts of which are set out below.[2] Said recount was ordered to be commenced on December 8, 1970.

On December 3, 1970, plaintiff Hantke brought this action to enjoin the defendant recount commission from proceeding with the recount in Marion County, and to enjoin the defendant Roudebush generally from taking further action to obtain a recount in the other counties in which his recount petitions were filed. Jurisdiction was

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2 Section 29-5401. "Any candidate for any public office voted upon at any election held within the state of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the conditions and in the manner and with the effect as in this article [§§ 29-5401—29-5417] provided."

Section 29-5402. "The right of recount provided in this article [§§ 29-5401—29-5417] shall be available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipal, county, district, judicial, legislative, and state elective office and candidates for membership in the house of representatives and in the senate of the United States; and such right of recount may by any candidate be exercised with respect to one [1] or several or all of the voting precincts in which votes were cast for the office for which he was a candidate."

Section 29-5405. "Each such petition shall state the office and the precinct or precincts within the county in respect of which the petitioner desires a recount; . . . that the petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that the petitioner desires to contest said election in respect of said office, . . . and that he desires a recount of all of the votes cast for such office in such precinct or precincts. The term 'contest' as used in this section shall include all forms

of contest herein or hereafter recognized as appropriate means for contesting title to a public office. . . ."

Section 29-5409. . :"Upon the filing of such petition and undertaking, the court or the judge thereof in vacation shall, upon the expiration of twenty-five [25] days after such election and upon proof of service of said notice or notices, grant such petition and cross-petition or cross-petitions as may have been filed and order the recount of such votes in such precinct or precincts . . ."

Section 29-5414. :"When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court.

"(Except for the offices of governor, lieutenant-governor, and members of the general assembly,) such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; . . ."

Section 29-5415. "If a recount is had in respect to an office for which votes were cast in all voting precincts of the state, (except governor and lieutenant-governor,) or in more than one [1] county, (except members of the general assembly,) the clerk of the circuit court where such recount was had shall determine whether the votes as shown by such recount certificates differ from the votes in such precinct or precincts as the same had been returned to, and tabulated by the county canvassing board, and if he finds there is such difference he shall make his certificate showing the total vote in such county for such office for each candidate as corrected in accordance with the votes shown by such recount certificate and shall forthwith transmit the same to the secretary of state . . . and if the secretary of state shall previously have included in his tabulations votes cast for such office as returned by such county canvassing board he shall correct such tabulation, . . . and the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office."

Note: Portions in ( ) added by 1961 amendment, as discussed *infra*.

predicated on 28 U.S.C. § 1343(3), with request that a three-judge district court be convened to hear the case, pursuant to 28 U.S.C. § 2284. The jurisdiction of a three-judge court over an action in which a candidate for the Congress of the United States alleges the deprivation of a right under color of a state election law, and the unconstitutionality of such law in the light of the Constitution of the United States has been recognized. *Voltaggio v. Caputo,* D. N.J., 1963, 210 F.Supp. 337, app.dis., 371 U.S. 232, 83 S.Ct. 325, 9 L.Ed.2d 494. See also *Socialist Labor Party v. Rhodes,* S. D. Ohio, 1968, 290 F.Supp. 983, aff'd as modified, *sub nom* Williams v. Rhoades, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24. This court was properly convened, and has jurisdiction in the premises.

The attorney General of Indiana has been permitted to intervene, pursuant to 28 U.S.C. §2284(2), and has filed a motion to dismiss the action. The defendant Roudebush has likewise moved to dismiss. An argument common to both motions is that this court lacks jurisdiction to grant injunctive relief, as prayed for, because prohibited by 28 U.S. § 2283.[3]

The statute referred to has been characterized as ambiguous, by the Supreme Court of the United States, speaking without dissent. *Leiter Minerals, Inc. v. United States,* 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267. It is therefore not surprising that various, and to some extent contradictory, interpretations of it have been made. One view, which we find persuasive, is that Section 2283 is not a jurisdictional statute, but is rather, in essence, a

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3. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

statutory adoption of the doctrine of comity and hence discretionary in its application. In spite of its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances justify such relief. *Baines v. City of Danville,* 4 Cir., 1964, 337 F.2d 579, 593. This appears to be particularly true with respect to cases arising pursuant to 42 U.S.C. § 1983, as to which 28 U.S.C. § 1343, under which this suit is brought, is the jurisdictional analogue. *Machesky v. Bizzell,* 5 Cir., 1969, 414 F.2d 283; *Carmichael v. Allen,* N.D. Ga., 1967, 267 F.Supp. 985 (three-judge court); *Landry v. Daley,* N.D. Ill., 1968, 288 F.Supp. 194, 233. See *Dombrowski v. Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22.

Another ground for dismissal urged by the defendant Roudebush is that this court lacks jurisdiction because exclusive jurisdiction to determine the effect of the recount proceedings commenced by him is in the United States Senate by virtue of Article 1, Section 5 of the Constitution of the United States, which provides "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." But a right claimed under the same Constitutional provision—the right to have the returns of the November 3 election judged by the Senate and not piecemeal by various commissions appointed by various state courts—is the very right which plaintiff asserts is being violated by the defendant Roudebush's state court actions. Regardless of the position taken, all parties agree as to the supremacy of the Senate itself to make the final determination as to the winner of the recent election. *Reed v. County Commissioners,* 277 U.S. 376, 48 S.Ct. 531, 72 L.Ed. 924; *Barry v. U. S. ex rel Cunningham,* 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867.

The great weight of authority supports plaintiff's position that court proceedings for recount or contest with regard to an election for representative in the national House of Representatives or for United States Senator are unconstitutional, as in conflict with Article 1, Section 5, whether brought in state or federal court. *State ex rel Fleming v. Crawford,* 1891, 28 Fla. 441, 10 So. 118; *Burchell v. State Board of Election Commissioners,* 1934, 252 Ky. 823, 68 S.W.2d 427; Opinion of the Justices, 1956, 152 Me. 212, 142 A.2d 532; *Belknap v. Board of Canvassers,* 1893, 94 Mich. 516, 54 N.W. 376; *McLeod v. Kelly,* 1942, 304 Mich. 120, 7 N.W.2d 240; *State ex rel 25 Voters v. Selvig,* 1927, 170 Minn. 406, 212 N.W. 604; *Odegard v. Olson,* 1963, 264 Minn. 439, 119 N.W.2d 717; *State ex rel McCue v. Blaisdell,* 1908, 18 N.D. 55, 118 N.W. 141; *Laxalt v. Cannon,* 1964, 80 Nev. 588, 397 P.2d 466; *Opinion of the Justices,* 1921, 80 N.H. 595, 113 A. 293; *Smith v. Polk,* 1939, 135 Ohio St. 70, 19 N.E.2d 281; *Sutherland v. Miller,* 1917, 79 W.Va. 796, 91 S.E. 993; *State ex rel Wettengel v. Zimmerman,* 1946, 249 Wis. 237, 24 N.W.2d 504; *Keogh v. Horner,* 1934, S.D. Ill., 8 F.Supp. 933; *Peterson v. Sears, et al.,* 1964, N.D. Iowa, 238 F.Supp. 12.

An equally strong body of authority supports the same rule with regard to the lack of jurisdiction in the courts to countenance suits for recount or contest with regard to elections of members of the State legislatures. The reasoning is identical and is predicated on provisions of the various state constitutions which copy Article 1, Section 5 of the Constitution of the United States either verbatim or in substance. We deem it unnecessary to burden this opinion with a collection of these many cases, inasmuch as the Supreme Court of Indiana has had occa-

sion to speak three times in the past twenty years on the subject of legislative recounts, attempted under the statute here involved, Burns Ind. Stat. Ann. §§ 29-5401—29-5417, inclusive.

This trilogy consists of the cases of *State ex rel Acker, et al v. Reeves,* 1951, 229 Ind. 126, 95 N.E.2d 838, *State ex rel Beaman v. Circuit Court of Pike County, et al,* 1951, 229 Ind. 190, 96 N.E.2d 671, and *State ex rel Batchelet v. Dekalb Circuit Court, et al.* 1967, 248 Ind. 481, 229 N.E.2d 798. The provision of the Constitution of Indiana which controlled the cases is Article 4, Section 10, which is virtually identical to Article 1, Section 5 of the Constitution of the United States.[4] In each case, a defeated candidate for the General Assembly of Indiana filed a petition for a recount pursuant to Burns Ind. Stat. Ann. §§ 29-5401—29-5417, in each case the trial court appointed a recount commission, and in each case the Supreme Court of Indiana issued a writ of prohibition restraining the court from proceeding with the recount on the ground that it was constitutionally impermissible in the light of Article 4, Section 10.

In order to understand *Acker, Beaman,* and *Batchelet,* and, for that matter, our own decision, it is necessary to make plain what the unadorned word "recount" has been taken to mean in Indiana. It will be noted immediately that the statute (Footnote 2) does not specify in what manner the recount shall be conducted; however, we find from the undisputed evidence in the case before us, and in addition know judicially, that by custom, usage and practice recounts in Indiana have been con-

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4 Article 4, Section 10: "Each House, when assembled, shall . . . judge the elections, qualifications and returns of its own members."

ducted under the statute as follows: (1) with regard to votes registered on voting machines, the machines are inspected by the commission, and the totals checked against the tally sheets and certificates of memoranda as to total votes cast for each office; this operation is purely mechanical and/or mathematical and creates no problems; (2) with regard to votes cast by paper ballot, which includes all of the votes cast in some of the counties of the State of Indiana and a part of the votes cast in all counties of the State, the commission exercises its own judgment, sometimes supplemented by instructions from the court which appoints it, as to which ballots are to be counted and which not counted, and thereby, for all purposes, nullifies and supersedes the judgment of the duly constituted election boards in this regard.

Further, the election laws provide that after tallying the vote, each local election board must place in separate envelopes, clearly marked, all of the ballots which it counted, and all of the ballots which it did not count. Such envelopes are then sealed with wax, to preserve their integrity. The commission necessarily breaks the seals and removes the ballots for the purpose of its recount—or rejudging, as would appear to be more accurate—and reassembles them according to its own determinations, which may well be by 2-1 vote in many instances.

There is no way in which the commission may make a simple mathematical verification of the vote. As illustrative of the problems encountered, a ballot may, under certain circumstances, be valid and countable for one office, but not for another. If counted for any office it is placed in the "counted" envelope; but the commission has no way of knowing how the election board counted it—whether for all offices, or only for some. The main problems, of course, arise with respect to the counting

of ballots not absolutely perfect on their face. What is a distinguishing mark? What was the intent of the voter? As the record in the many permissible recount cases, too numerous to cite, all reflect, judgments must constantly be made in determining which ballots to count and which not to count when "recounts" are made under the Indiana recount law.

It was in this context, then, that the Supreme Court of Indiana first confronted the constitutional question as to the jurisdiction of the Indiana courts to appoint recount commissions with respect to an election for a seat in the Indiana House of Representatives. The Court quoted Article 4, Section 10 Indiana Constitution and pointed out its similarity to Article 1, Section 5 United States Constitution. It then quoted with approval from *Lucas v. McAfee*, 1940, 217 Ind. 534, 29 N.E.2d 403, 29 N.E.2d 588, as follows:

> "'The right of legislative bodies to judge the elections, qualifications, and returns of their own members is of ancient origin. The history of the doctrine reveals that it was established in the constitutional law of England in the year of 1586, during the reign of Queen Elizabeth . . . .
>
> 'Provisions guaranteeing this right are to be found in the federal Constitution and in the organic law of every state in the Union, in language substantially if not identically like that employed in ours. . . . That right is deemed essential to the enactment of legislation without interruption and confusion and to maintain a proper balance of authority where the functions of government are divided between coordinate branches. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Con-

stitution has defined a domain upon which courts may not tread. *Dinan v. Swig,* 1916, 223 Mass. 516, 112 N.E. 91.' "

The Court then went on to hold the statute unconstitutional and void to the extent that it purported to apply to members of the General Assembly, and entered its writ of prohibition accordingly.

Beaman, like *Acker,* arose out of the general election of 1950, and was considered at about the same time by the same court. Here original suits were brought in two counties to obtain a recount for the office of Joint State Senator and recount commissions were appointed in each county. The judges of the two courts were again prohibited from proceeding with the recounts. On behalf of respondents, as in the case before us, the argument was made that in carrying out the provisions of the recount statute the courts and their commissions were acting simply in a ministerial capacity. The Court pointed out its recent decision in *Acker,* and held that since the recount statute was unconstitutional as applied to recounts for the legislature, it was, to such extent, void ab initio and inoperative from the time of its passage. Therefore, it reasoned, it could not confer any jurisdiction upon any court either for the performance of judicial or ministerial acts, and hence the appointment of recount commissioners was beyond the lawful jurisdiction of the courts involved.

Also, as here, respondents argued that a recount of votes is not an adjudication of the election or rights to an office but is only a proceeding in discovery. The Supreme Court rejected this theory also, pointing out the provisions of Section 29-5414, "*Such recount certificates shall supersede for all purposes all previous re-*

turns. . ." (Supreme Court's emphasis), and of Section 29-5415 , ". . . the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election . . . notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office." The Court concluded from such provisions that if the effect of the statute was not an adjudication of the election and returns of members of the legislature it approached so nearly thereto "that it may interfere with the constitutional right of each house of the Legislature to judge the elections and returns of its members. . . . its effect is more than a mere procedure for the discovery of evidence." Unconstitutionality was reaffirmed.

These decisions put the matter at rest for the next several years. However, in 1961 the General Assembly attempted to bring the law into conformity with the Indiana Constitution with respect to the members of the general assembly and certain other state officers. It did so by inserting the language "Except for the offices of governor, lieutenant-governor, and members of the general assembly" where the same presently appear in Sections 29-5414 and 29-5415 (set out in ( ), Footnote 2), and by adding certain paragraphs to Section 29-5414 to provide that with respect to the general assembly, the results of the recount would be forwarded to the appropriate presiding officer for information only. It will be noted that all of the language found in *Beaman* to constitute a recount "more than a mere procedure for the discovery of evidence" remained untouched as to recounts for the office of United States Senator.

However, the effort to legitimize recounts for the General Assembly failed. In *Batchelet* a recount for State

Senator was attempted in the DeKalb Circuit Court under the amended statute, and that Court appointed a recount commission. The recount was immediately halted by a temporary writ of prohibition issued by the Supreme Court of Indiana. The Senate itself then resolved the dispute, as provided by Article 4, Section 10. In thereafter making the temporary writ permanent, in stead of simply dismissing the proceeding as moot in light of the seating of Senator Batchelet, the Supreme Court again quoted from *Acker:* "(The) right of legislative bodies to judge the election, qualifications, and returns of their own members is of ancient origin. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread." The lower court was held to have no jurisdiction.

If, as cannot possibly be denied, it is unconstitutional under Indiana law for an Indiana Circuit or Superior Court to conduct a recount for the office of member of the General Assembly, even after the passage of the abortive 1961 amendments, *a fortiori* it is manifestly repugnant to the Constitution of the United States for such a court to attempt to conduct a recount for the office of United States Senator, as to which office such amendments were not even sought to be applied.

We now return to further discussion of the effect, or lack of effect, of 28 U.S.C. § 2283. At the outset, it will be noted that the section contains three specific exceptions which remove the statutory inhibition in certain circumstances. (Footnote 3). Obviously, if the suit at hand falls within one of the exceptions, no further discussion

is required. It has been urged in recent cases arising under 42 U.S.C. § 1983[5] and brought pursuant to 28 U.S.C. § 1343 that Section 1983 itself furnishes a specific exception applicable to Section 2283, in that it specifically authorizes relief by ". . . suit in equity, or other proper proceeding for redress." Indeed, it has been so held. *Cooper v. Hutchinson*, 3 Cir., 1950, 184 F.2d 119. in *Dombrowski, supra*, the Supreme Court found decision of this question unnecessary to its disposition of the case, and therefore declined to resolve it. It likewise specifically declined to resolve the question in *Cameron v. Johnson*, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182. The proposition therefore remains quite viable.

However, it is true that whether one takes the view of the Third Circuit as expressed in *Cooper* that Section 1983 constitutes a specific exception to Section 2283, or whether one takes the view we have adopted that notwithstanding Section 2283 a state court proceeding may be enjoined where special circumstances justify such relief, it does not follow that equitable relief will automatically be granted. Indeed, in some of the cases relied upon in support of each of the rules as above stated, refining the scope of Section 2283, injunctive relief was ultimately denied by reason of the application of principles of comity and the abstention doctrine. E.g., *Baines v. City of Danville, supra; Cooper v. Hutchinson, supra.*

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5 Section 1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The question involved here is one of federal constitutional law, and the state statute involved is not of an uncertain nature. Neither is the state statute susceptible of a limiting construction, because it has already been construed three times by the Supreme court of Indiana and thrice held unconstitutional. In such circumstances the abstention doctrine does not apply. *Harman v. Forsenius,* 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50; *Baggett v. Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377; *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440; *McNeese v. Board of Education,* 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622; *City of Chicago v. Atchison, T. & S.F. R. co.,* 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174; *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 65 S.Ct. 152, 89 L.Ed. 101.

Just as the defunct legal posture of the Indiana recount statute makes clear that abstention is not appropriate, the special circumstances disclosed by the facts impel the conclusion that the active interposition of this Court is required. What defendants are threatening to do, and will do if not enjoined, constitutes an interference with the orderly processes of the recent election, and with the Constitutional prerogatives of the United States Senate. The plaintiff, as a candidate for reelection to that body, has a constitutional right to have the election contest, if there is to be one, held before the sole tribunal having jurisdiction in the premises, the Senate itself. It is essential to plaintiff's right that the integrity of the ballots cast at such election be preserved, i.e., that they be held in their original envelopes, with the seals intact, and that the integrity of the tally sheets, voting machines, and other paraphernalia of the election likewise be preserved until such time as they may be called for by the Senate, so

that no question may arise as to the character of the evidence which the Senate will be called upon to judge. Plaintiff's rights will be irreparably harmed if such evidence is compromised, for which there can be no adequate remedy at law. The harm to be avoided will take place immediately, if not enjoined. Like Humpty Dumpty, the seals on the ballots cannot be put back together again, if once destroyed, hence the frequent reason given for abstention—that all can be made right through state appellate procedures—does not apply.

We surmise that the defendant's argument here would be less heated if, for example, we had before us, instead of a purported recount commission appointed by the Superior Court of Marion County, a purported recount commission appointed by a Justice of the Peace of Beanblossom Township, Brown County, Indiana, directed by the Justice to open, inspect, and judge anew all of the ballots cast in the whole State for the office of United States Senator. But what would be the difference?

As was said by the Supreme Court of Indiana in *Beaman,* the statute involved was void *ab initio* and conferred no power upon any court to perform either a ministerial or a judicial act thereunder, as to "recounts" for legislative office. Consistently, therefore, there could be no difference at all between the legal standing of the defendant commissioners in this action, and the hypothetical Brown County commissioners. Thus considered, what we are here enjoining is not in any true sense a "proceeding" in a State court, but, more appropriately, a threatened invasion of the sanctity of the ballots by persons acting wholly without legal authority.

The respective motions to dismiss the action are therefore each denied, and a preliminary injunction will issue

forthwith, as prayed for by the plaintiff, upon his giving bond as provided in Rule 65(c), F.R.C.P., in the penal sum of $5,000.00.

Dated this 19th day of December, 1970, as of December 17, 1970, at 5:45 P. M., pursuant to the oral announcement of the Court's decision and order at the conclusion of the hearing on the prayer for a preliminary injunction.

Certified: A true copy
Arthur J. Beck, Clerk
U. S. District Court
Southern District of Indiana

By
Deputy Clerk

/s/ WILLIAM E. STECKLER
William E. Steckler

/s/ S. HUGH DILLIN
S. Hugh Dillin

Judges of the United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE,	)	
	)	
vs	)	NO. IP 70-C-694
	)	
RICHARD L. ROUDEBUSH, et al.	)	

Entry for December 15, 1970
Honorable S. Hugh Dillin, Judge

This cause comes before the Court upon the motion of Theodore L. Sendak, Attorney General of the State of Indiana, for leave to intervene as a party defendant herein.

The Court having read and considered said motion and being fully advised now grants said motion.

Comes now said intervening defendant and files his motion to dismiss the cause of action.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE, Plaintiff,	)	
vs	)	NO. IP 70-C-694 CAUSE
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER, Defendants,	)	
and	)	
THEODORE SENDAK, Attorney General of Indiana, Intervening Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Theodore L. Sendak, Attorney General of the State of Indiana, intervening Defendant, hereby appeals to the Supreme Court of the United States from the order of this Court entered in this cause on December 17, 1970, denominated a preliminary injunction and purporting to continue in full force and affect, the *ex parte* temporary restraining order entered by this Court on December 3, 1970, enjoining any action whatsoever to effectuate any of the procedures

for conducting a recount for the office of the United State Senator for the State of Indiana, according to the applicable statutes of the State of Indiana pending or otherwise, anywhere in the State of Indiana.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

/s/ THEODORE L. SENDAK
Theodore L. Sendak
Attorney General of Indiana

/s/ WENDELL C. HAMACHER
Wendell C. Hamacher
Deputy Attorney General

/s/ WILLIAM F. THOMPSON
William F. Thompson
Assistant Attorney General

Attorneys for Theodore L. Sendak, Attorney General of the State of Indiana, Intervening Defendant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal has been served on the following attorneys of record in the above-captioned cause by depositing in the United States Mail a copy of same, first-class postage prepaid, this 18th day of December, 1970.

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William F. Thompson

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE,

vs

NO. IP 70-C-694

RICHARD L. ROUDEBUSH,
SAMUEL J. WALKER,
JOHN R. HAMMOND,
DUGE BUTLER,

THEODORE SENDAK, Attorney General of Indiana,

Entry for December 18, 1970
Honorable S. Hugh Dillin, Judge

The Court now Overrules the petition of the Attorney General of the State of Indiana to stay interlocutory order.

INDIANA RECOUNT STATUTE

29-5401. Elections—Right of candidate to recount of votes.—Any candidate for any public office voted upon at any election held within the state of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the conditions and in the manner and with the effect as in this article [§§ 29-5401—29-5417] provided. [Acts 1945, ch. 208, § 324, p. 680.]

29-5402. Right of recount—Candidates entitled—Application to voting precincts.—The right of recount provided in this article [§§ 29-5401—29-5417] shall be

available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipal, county, district, judicial, legislative, and state elective office and candidates for membership in the house of representatives and in the senate of the United States; and such right of recount may by and candidate be exercised with respect to one [1] or several or all of the voting precincts in which votes were cast for the office for which he was a candidate. [Acts 1945, ch. 208, § 325, p. 680.]

29-5403. Petition for recount—Verification—Filing—Cross-petition by candidate elected—Time in which cross-petition must be filed.—The candidate desiring a recount of votes shall file a verified petition or petitions therefor, as the case may be, in the circuit or in a superior court of the county or counties in which is located or are located the voting precinct or precincts in which he desires a recount of the votes cast for the office for which he or she was a candidate at such election, or before the judge of any such court in vacation and each such petition shall specify the voting precinct or precincts within the county in which the petition is filed in which such recount is desired; such petitions for the recount of votes cast at an election shall be filed within fifteen [15] days after the day on which such election was held: Provided, That any candidate, who, on the face of the election returns is elected to any office at such election, shall be permitted to file a cross-petition or cross-petitions for a recount within twenty-five [25] days after the day on which said election is held and each such cross-petition shall specify the voting precinct or precincts within the county in which the cross-petition is filed in which such recount is desired. If a petition for recount is filed for an office for which

voters in more than one county vote a cross-petition for a recount may be filed in a county or counties in addition to the one in which the first petition was filed: Provided, That such cross-petition or cross-petitions for a recount shall be filed within twenty-five [25] days after the day on which said election is held and that such cross-petition or cross-petitions shall ask for a recount of all votes cast for such office in the second or more counties; Provided, further, That in the case of a state-wide elective office, if more than two [2] counties are involved through petition or cross-petition, the petitioner and cross-petitioner shall each bear ten per cent [10] of the costs occasioned by the recount and the remainder of said cost shall be appropriated and paid from the general fund as other expenditures of the state of Indiana, notwithstanding any other provisions of the Acts of 1945, chapter 208. If on either such day the court shall be in vacation the petition or cross-petition shall be deemed duly filed in time if filed in the office of the clerk of the court, but no such petition shall be granted and no recount ordered until after such twenty-fifth day following such election unless the defendant or defendants to the petition or petitions file a written waiver or waivers of their right to file a cross-petition or cross-petitions as provided in That the filing of a cross-petition is discretionary and not obligatory and failure to file either a cross-petition or an answer shall not be construed as an admission of the truth of the allegations of the petition for a recount nor shall it give rise to any presumption in favor thereof. [Acts 1945, ch. 208, § 326, p. 680; 1961, ch. 313, § 2, p. 861.]

29-5404. Candidates may join in petition for recount—Consolidation of petitions for recount.—Two [2] or more

candidates for the same or different offices voted upon at the same election may join in such petition or petitions for recount. If more than one [1] petition for recount is filed in any county within fifteen [15] days following an election, whether in the same court of such county or not, such petitions shall be ordered consolidated under the petition first filed, and if a transfer of petitions from one court of such county to another court of such county is necessary to effect such consolidation such transfer shall on motion be ordered by the court in which the subsequent petition or petitions were filed, or the judge thereof in vacation. [Acts 1945, ch. 208, §327, p. 680.]

29-5405. Petition for recount—Contents—Term "contest" defined—Amendment of petition.—Each such petition shall state the office and the precinct or precincts within the county in respect of which the petitioner desires a recount; that he was a candidate at such election for such office and that the office was voted upon in the precinct or precincts specified; the name and post-office address of petitioner's opposing candidate or candidates; that the petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that the petitioner desires to contest said election in respect of said office, or that the petitioner desires to prepare for a contest in respect of such office which he has reason to believe will be instituted against him; and that he desires a recount of all of the votes cast for such office in such precinct or precincts. The term "contest" as used in this section shall include all forms of contest herein or hereafter recognized as appropriate means for contesting title to a public office. The court in which such petition is filed or the judge thereof in vacation may allow such petition to be

amended at any time upon such terms and conditions as the court or judge may order. [Acts 1945, ch. 208, § 328, p. 680.]

29-5406. Cross-petition — Contents — Amendment of cross-petition. — Each such cross-petition shall state the office and the precinct or precincts within the county in respect of which the cross-petitioner desires a recount; that he was a candidate at such election for such office and that the office was voted upon in the precinct or precincts specified; the name and post-office address of the cross-petitioner's opposing candidate or candidates; that the cross-petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such elecion in such precinct or precincts were not correctly counted and returned; that he desires a recount of all of the votes cast for such office in such precinct or precincts. The court in which such cross-petition is filed or the judge thereof in vacation may allow such cross-petition to be amended at any time upon such terms and conditions as the court or judge may order. [Acts 1945, ch. 208, § 329, p. 680.]

29-5407. Notice of filing and pendency of petition—Duty of clerk to issue notice—Duty of sheriff.—Upon the filing of such petition, the clerk shall issue a notice of such filing and pendency of such petition to the opposing candidate or candidates and deliver the same to the sheriff or sheriffs of the county or counties in which such opposing candidate or candidates reside; and said sheriff or sheriffs shall immediately serve the same upon such opposing candidate or candidates in person or by leaving a copy at his or their last and usual place of residence and shall make immediate return of such service. [Acts 1945, ch. 208, § 330, p. 680.]

29-5408. Bond for payment of costs.—Each petitioner shall furnish a cash deposit or file an undertaking with corporate surety to the approval of the court for the payment of all costs of such recount, the minimum amount of which shall be one hundred [$100] dollars. Should the number of precincts to be counted exceed ten [10], the amount of the deposit or bond, as the case may be, shall be increased by ten dollars [$10] for each and every precinct in excess of ten [10]. Any unexpended balance remaining in any deposit after payment of all the costs occasioned by the recount proceedings shall be returned to the depositor: Provided, That where the petition is joint a joint undertaking may be furnished: Provided, however, That in the event a cross-petition is filed then the petitioner or petitioners and the cross-petitioner or cross-petitioners shall either furnish cash deposits or file undertakings with corporate surety to the approval of the court for the payment of his or their proportionate share of the cost of such recount as hereinafter provided: Provided, That where the cross-petition is joint a joint undertaking may be furnished. [Acts 1945, ch. 208, § 331, p. 680.]

29-5409. Granting petition and cross-petition—Appointment of recount commission.—Upon the filing of such petition and undertaking, the court or the judge thereof in vacation shall, upon the expiration of twenty-five [25] days after such election and upon proof of service of said notice or notices, grant such petition and cross-petition or cross-petitions as may have been filed and order the recount of such votes in such precinct or precincts, and if there is a consolidation of such petitions and cross-petitions, the court shall by consolidated order grant such consolidated petitions and cross-petitions and shall order a consolidated recount of all votes in all pre-

cincts in such county specified and requested in such petitions and cross-petitions. In either case the court or the judge thereof in vacation shall appoint a recount commission of three [3] members to make the recount or recounts ordered, and the commission shall in the same process recount all of the votes ordered recounted. [Acts 1945, ch. 208, § 332, p. 680.]

29-5410. Recount commission—Qualifications of members—Compensation.—If any of the votes to be recounted were cast by means of voting machines, one [1] member of the recount commission shall be a competent mechanic who is familiar with such voting machines. All of such commissioners shall be voters, qualified to vote at such election and two [2] of such commissioners shall be selected from the two [2] opposite political parties which cast the highest and next highest votes in this state for secretary of state at the last preceding general election. Each member of the commission shall receive ten dollars [$10.00] for each day while actually engaged in making such recount. The cost of such recount shall be paid by each petitioner or cross-petitioner, as hereinafter provided. [Acts 1945, ch. 208, § 333, p. 680.]

29-5411. Duty of commission—Watchers—Representatives of press entitled to attend.—On a day, not sooner than five [5] days after the recount is ordered, and at a place to be fixed by order of the court, such commission shall convene and commence such recount and shall expeditiously complete the same. Each candidate affected by such recount shall be entitled to have a watcher present at such recount and shall himself have the right to be present. Representatives of the press shall also be entitled to attend such recount. [Acts 1945, ch. 208, § 334, p. 680.]

29-5412. Duty of clerk when order of recount is made and entered by court.—On the day when the order of recount is made and entered by the court, the clerk of the circuit court shall, by registered United States mail, mail a certified copy of such order to each opposing candidate named in such petition at the address therein given, and shall tax the cost thereof to the petitioner. [Acts 1945, ch. 208, § 335, p. 680.]

29-5413. Protection of ballots, voting machines, tally sheets and other papers—Duty of court.—The court shall by order impound, and provide for the protection of all ballots and voting machines used at such election for casting votes for such office or offices in such precinct or precincts, together with all tally sheets relating thereto and all lists of the names and addresses of all persons registered by the clerk as having voted for such office or offices, and shall make the same available to said recount commission or to any contest commission appointed pursuant to section 351 [§ 29-5603] (a) (b) and (c) of this act [chs. 28-60 of this title]. [Acts 1945, ch. 208, § 336, p. 680; 1961, ch. 313, § 3, p. 861.]

29-5414. Completion of recount—Certificate of commission—Filing—Duty of clerk—Effect of certificate—Procedure when recount for office of governor, lieutenant-governor, and members of general assembly.—When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the

circuit court. The clerk shall enter such certificate in the order book of such court.

Except for the offices of governor, lieutenant-governor, and members of the general assembly, such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such recount certificates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any contest or other preceeding [proceeding] in which there is an issue as to the votes cast at such election for such office or offices.

Upon a recount for the office of governor or lieutenant-governor, each clerk of the circuit court shall, on the day following the completion of the recount, make out, at full length, two [2] certified statements, under the seal of the clerk of the circuit court, of the number of votes each candidate received; one [1] of which he shall transmit to the speaker of the house of representatives of the next general assembly, by its senator or representative, who shall deliver the same to such speaker on the first day of the session and the other certified statement shall be transmitted by registered mail to Indianapolis, directed to said speaker, and to the care of the secretary of state, by whom the same shall be delivered to the speaker on the first day of the session.

If a recount is had in respect to votes cast for senator or representative in the general assembly, each clerk of the circuit court, on the day following the completion of the recount, shall make and certify two [2] statements showing the total number of votes each candidate received; he shall transmit one [1] such certified state-

ment to the person having the highest number of votes for senator or representative, and shall transmit one [1] certified statement to the presiding officer of the house in which the successful candidate is to be seated, directed to the care of the secretary of state, by whom the same shall be delivered to the said presiding officer on the first day of the next session of the general assembly. The said certified statement shall be referred by such presiding officer for such action as that body may find appropriate: Provided, however, That when two [2] or more counties compose a district to elect a senator or representative, the clerks of such counties shall meet on Wednesday next following the day such recount is completed between the hours of one [1] and six [6] of the afternoon, at the courthouse of the oldest county in such district, where they shall compare the recount certificates filed with them and shall jointly make out and certify two [2] statements showing the total number of votes each candidate received and shall transmit the same as provided herein.

The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted as herein provided for the purpose of referring the information therein contained to the appropriate authorities. [Acts 1945, ch. 208, § 337, p. 680; 1961, ch. 313, § 4, p. 861.]

29-5415. Recount in respect to office for which votes were cast in all voting precincts of state—Duty of clerk to certify recount vote to secretary of state—Duty of secretary of state.—If a recount is had in respect to an office for which votes were cast in all voting precincts of the state, except governor and lieutenant-governor, or in more

than one [1] county, except members of the general assembly, the clerk of the circuit court where such recount was had shall determine whether the votes as shown by such recount certificates differ from the votes in such precinct or precincts as the same had been returned to, and tabulated by the county canvassing board, and if he finds there is such difference he shall make his certificate showing the total vote in such county for such office for each candidate as corrected in accordance with the votes shown by such recount certificate and shall forthwith transmit the same to the secretary of state who then shall tabulate the vote for such office from such county in accordance with such certificate from such clerk; and if the secretary of state shall previously have included in his tabulations votes cast for such office as returned by such county convassing board he shall correct such tabulation, in accordance with such certificate from such clerk and the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office. [Acts 1945, ch. 208, § 338, p. 680; 1961, ch. 313, § 5, p. 861.]

29-5416. Recount in respect to office voted upon in single county, city or smaller unit—Duty of clerk.—If the office in respect to which such recount is had was voted upon only in a single county, except members of the general assembly, city, or smaller unit, then the clerk of the circuit court shall determine whether the total tabulation of all votes for such office as made by the county canvassing board authorized to make such total tabulation is affected by the results of such recount as shown by such recount certificate, and if it is, then such clerk shall

make his certificate showing the correct total vote for such office in accordance with such recount certificate and shall transmit such certificate to the county election board or such other officer as may be authorized by this act [chs. 28-60 of this title] to issue a certificate of election or commission for such office; and the candidate shown by such certificate of the clerk to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office, notwithstanding one may have been issued upon a previous return or certificate of the total votes cast for such office. [Acts 1945, ch. 208, § 339, p. 680; 1961, ch. 313, § 6, p. 861.]

29-5417. Payment of costs of recount—Time.—In those cases in which no cash deposit is made as provided in section three hundred and thirty-one [§ 29-5408], the petitioner or petitioners shall pay all of the costs occasioned by the recount to the clerk of the circuit court within ten [10] days after the recount has been finally completed: Provided, however, That in the event a cross-petition or cross-petitions are filed then the party or parties filing such cross-petition or cross-petitions shall pay to the clerk of the circuit court of the county in which such recount is had within ten [10] days after the recount is completed all of the costs occasioned by the recount of votes in the precinct or precincts which have been designated in his or their respective cross-petition or cross-petitions and the petitioner or petitioners shall be relieved of these costs of the recount. [Acts 1945, ch. 208, § 340, p. 680.]

IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. 1232

RICHARD L. ROUDEBUSH,

Appellant,

v.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

No. 1236

THEODORE L. SENDAK
ATTORNEY GENERAL OF INDIANA,

Appellant,

v.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND RICHARD L. ROUDEBUSH,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

MOTION TO DISMISS THE APPEALS AS MOOT

R. Vance Hartke, Appellee herein, moves the Court to dismiss the appeal of Richard Roudebush in Cause No. 1232, and the appeal of Theodore Sendak in Cause No. 1236 on the ground that events occurring after the filing

of the Petitioner's Jurisdictional Statement in each cause have rendered the issues raised by these appeals moot.

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MEMORANDUM IN SUPPORT OF MOTION

The relief sought by Petitioner Roudebush in this appeal as well as in his Indiana state court proceeding in which recount commissioners were appointed (but enjoined from acting by the three judge District Court below) was a recount of the votes for United States Senator in the election of November 3, 1970.

Petitioners Roudebush and Sendak have properly and consistently maintained (See p. 17 Petitioner Sendak's Jurisdictional Statement) that any recount results obtained via the Indiana statute (declared unconstitutional below as to elections for United States Senator) would be merely advisory to the United States Senate. In spite of that position, Petitioner Roudebush did not take any formal action before the United States Senate to contest the right of Appellee Hartke to a seat in the United States Senate, as was done by other disappointed candidates. (Petitions were filed with the Senate Committee on Elections and Privileges, and are currently pending, contesting the elections of Senator Pastore, Rhode Island, and Senator Buckley, New York).

On January 21, 1971, Appellee Hartke was sworn in and seated in the United States Senate, as recited at Congressional Record, January 21, 1971, p. 54. By swearing in and seating Appellee Hartke, the United States Senate "judged" in favor of him as to such election of November 3, 1970, thus exercising its exclusive prerogative under Article 1, Sec. 5 of the United States Constitution. Such swearing in and seating of Appellee by the Senate rendered moot the controversy raised by these appeals.

The Senate having made its determination, the controversy raised by these appeals can no longer be affected by these proceedings, or those of the courts below, either

Federal or State. There is no longer any "immediacy or reality" to this controversy. "The federal courts . . . do not render advisory opinions." *Golden v. Zwickler,* 394 U. S. 103, 108 (1969) citing *United Public Workers of America (C.I.O.) v. Mitchell,* 330 U. S. 75, 89 (1947). Hartke having been seated by the Senate, no "specific live grievance" for presentation of the question of the constitutionality of the Indiana recount statute as applied to a United States Senatorial election remains. See *Golden v. Zwickler, supra,* at p. 110. *Hall v. Beals,* 90 S.Ct. 200, 201 (1969).

The Appellee Hartke therefore prays that these appeals be dismissed as moot.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~1232~~ 70-66

RICHARD L. ROUDEBUSH,

Appellant,

vs.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL AS MOOT.

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THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1232.

RICHARD L. ROUDEBUSH,

Appellant,

vs.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL AS MOOT.

Appellant's jurisdictional statement adequately sets forth his position that the questions presented by this appeal are substantial. Although appellee Hartke had the right to file a motion to affirm the judgment sought to be reviewed on this appeal if he thought the questions on which the decision of this cause depends are so unsubstantial as not to need further argument (Rule 16(1) (c)), he has not done so, and the inference can be drawn that he concedes that the questions presented are substantial.

Appellee Hartke's only motion is to dismiss this appeal as moot. He contends that the swearing in and seating of

him by the United States Senate on January 21, 1971, rendered moot the controversy raised by this appeal. Such is not the case. By unanimous consent of the Senate, the oath was administered to appellee Hartke "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order." The relevant proceedings are recited at page S4 of the Congressional Record for January 21, 1971, as follows:

"ADMINISTRATION OF OATHS.

"The VICE PRESIDENT. The Senators to be sworn in will present themselves at the desk in groups of four, as their names are called by the clerk in alphabetical order.

"The clerk will call the names.

* * * * *

"The legislative clerk called the names of Mr. HARTKE, Mr. HRUSKA, Mr. HUMPHREY, and Mr. JACKSON.

"Mr. CURTIS. Mr. President, I ask unanimous consent that the oath may be administered to Mr. HARTKE, of Indiana, without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order; and I further ask unanimous consent that a letter setting forth the details be printed in the RECORD.

"The VICE PRESIDENT. Without objection, it is so ordered.

"There being no objection, the letter was ordered to be printed in the RECORD, as follows:

INDIANAPOLIS, IND.,
January 15, 1971.

Re: Statement on status of Roudebush vs. Hartke contest for U. S. Senate in Indiana.

Senator CARL CURTIS,
Senate Office Building,
Washington, D. C.

DEAR SENATOR:

Following the tabulation of votes cast for the United States Senate race on November 3, 1970, the unofficial tabulation indicated that out of more than 1.7 million votes, Senator Hartke was the leader by 4,283 votes.

Information obtained from various counties throughout the State of Indiana indicated that there may have been a large number of erroneous votes cast. Congressman Roudebush pursued the remedy set out by Indiana Statute (Burns Indiana Statutes 29-5401) and requested his right to a recount in eleven Indiana Counties. Senator Hartke filed motions to dismiss the Recount petitions in each of the eleven counties, on the premise that a recount is in violation of Article I, Section 5, of the United States Constitution.

Congressman Roudebush filed motions in opposition to the motions to dismiss. The first two courts to hear the motions to dismiss (a Republican Judge in Marion County and a Democrat Judge in Lake County) found in favor of Roudebush and ordered the recount to begin.

Senator Hartke then went to the Federal Courts (U. S. District Court, Southern District of Indiana, Cause No. IP 70-C-694) asking for injunctive relief. Judge S. Hugh Dillin granted an interlocutory injunction preventing the recount from proceeding. A three Judge panel was named (two Democrats-one Republican) and a hearing held on December 17, 1970. The Federal 3 Judge panel, by a 2 to 1 vote, issued a

restraining order preventing the recount. The Attorney General of Indiana had also opposed the restraining order on behalf of the citizens of Indiana.

Both the Attorney General of Indiana and Congressman Roudebush petitioned the Supreme Court of the United States to stay the injunction pending appeal. Justice Thurgood Marshall refused both petitions. Senator Hartke's answer to the above petitions was that to stay the injunction would do him irreparable harm.

A full appeal has now been filed in the Supreme Court of the United States. The case is pending and waiting the filing of pleadings by Senator Hartke. It is our contention that the election is not over until we have a recount, or the Supreme Court tells us we cannot have a recount. The other factor would be the unconditional seating of Senator Hartke.

I am enclosing a copy of the Jurisdictional Statement filed with the Supreme Court. It sets out the Indiana Statute pertaining to recount. The Indiana Statute does not question the Senate's right to judge the qualifications of its members, nor is the Judiciary attempting to meddle in legislative affairs. A recount is a ministerial function only—to make sure the vote count is correct. It would be difficult for the Senate to judge the election returns, if a recount is not conducted.

For all of the above reasons, we are hopeful that if Senator Hartke is seated, it will be conditioned upon the outcome of the appeal pending in the Supreme Court of the United States, and the recount, should we be allowed to conduct it. It is our belief that Congressman Roudebush was elected on November 3, 1970, and that a recount will verify his election as U. S. Senator.

Thank you for all of your assistance in this matter. Should you have any further questions, please call me.

Sincerely,

GORDON K. DURNIL,
Campaign Coordinator.

"These Senators, escorted by Mr. BAYH, Mr. CURTIS, Mr. MONDALE, and Mr. INOUYE, respectively, advanced to the desk of the Vice President; the oath prescribed by law was administered to them by the Vice President; and they severally subscribed to the oath in the official oath book."

By reason of the foregoing, it is clear that a live controversy continues to exist between the appellant and appellee Hartke.

Respectfully submitted,

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. ~~1936~~ 70-67

THEODORE L. SENDAK
Attorney General of the State of Indiana

Appellant

v.

R. VANCE HARTKE,
(Plaintiff Below)
RICHARD L. ROUDEBUSH
SAMUEL WALKER
JOHN R. HAMMOND
DUGE BUTLER
(Defendants Below)

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS, DIVISION

APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO DISMISS THE APPEAL AS MOOT

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Central Publishing Company, Inc., Indianapolis, Ind.

IN THE

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THEODORE L. SENDAK
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Appellant

v.

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APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO DISMISS THE APPEAL AS MOOT

The Attorney General of Indiana has intervened in this suit to defend the constitutionality of the Indiana recount statute. The Federal District Court opinion found the statute unconstitutional. The Attorney General is now appealing that decision, which, if erroneous, should not

be allowed to stand because of an allegation of mootness.

The appellee contends that since the United States Senate has seated him, the question as to the parties is now moot. As can be seen by an examination of 132 A.L.R. 1185, the great weight of authority indicates that an appellate tribunal may retain an appeal for final determination if it involves questions of public interest, even though the specific question has become moot as to the parties concerned. *Southern Pacific Terminal co. v. Interstate Commerce Commission,* 219 U.S. 433, 31 S.Ct. 288, 55 L.Ed. 283 (1911). This article points out that courts are more inclined to retain an appeal on the ground of public interest where:

1. The question is likely to arise in the future unless settled by a court of last resort;

2. The validity of a statute is in question;

3. A final determination is necessary for the guidance of public officials;

4. There is a question involving an election.

5. It would be difficult or even impossible to get a final determination of the question because the case must necessarily become moot before the appeal can be heard. 132 A.L.R. 1189-1191.

Without commenting on each of the above criteria individually, the appellant respectfully submits that *all* are relevant to the cause pending and should be considered before the question involved is declared moot.

The last point is especially salient to this suit because of the necessity of the United States Senate to seat the declared winner so soon after the election. If appellee

Hartke's argument is accepted, the constitutionality of the recount statute could never be subject to appellate review.

Appellee Hartke sought relief in the Federal District Court to declare Indiana's recount statute unconstitutional. The Federal District Court did this. Now appellee Hartke is attempting to block any further appeal of the question. The Attorney General has a duty to defend the constitutionality of all state statutes when attacked. This question deserves appellate review. To decide otherwise, in view of the United States Senate's procedure for seating the declared winner so soon after the election, would allow the Federal District Court to be the final arbiter since further appeal would be moot because the declared winner would have been seated.

As decided in *Powell v. McCormack,* 395 U.S. 486, (1969), the supposed mootness of a "primary" claim does not require the conclusion that all "secondary" claims are likewise moot. The United States Supreme Court held Powell's claim to membership in the 90th Congress was *not* moot, notwithstanding the fact that that session of Congress had terminated and Powell had been seated in the 91st Congress before the Court could hear the case. The opinion, *Powell, supra,* at 498-499, stated that Powell had not been paid his salary, which was an unresolved and hotly-contested claim, and that declaratory relief had been requested and remained a viable issue.

Appellee Hartke obtained a lower court decision that the Indiana statute is unconstitutional. The Attorney General now asks this court to review the Federal District Court's decision without regard to any allegations of mootness as pertains to Mr. Roudebush's right to be seated in the United States Senate. The State of Indiana is entitled to a final adjudication of its recount statute; a denial of

appeal because of mootness of the question as it pertains to Mr. Roudebush deprives this State of such an adjudication.

The Appellant Sendak therefore prays that this appeal be granted and that Appellee Hartke's Motion to Dismiss the Appeal as Moot be denied.

Respectfully submitted,

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Attorney General of Indiana

WILLIAM F. THOMPSON
Assistant Attorney General

MARK PEDEN
Deputy Attorney General

Attorneys for Appellant

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IN THE

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NO. 1236

THEODORE L. SENDAK
Attorney General of
the State of Indiana,

Appellant,

v.

R. VANCE HARTKE, et al,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

APPELLANT'S BRIEF

Appellants appeal from the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, entered on December 17, 1970, granting Appellee a preliminary injunction which continued in full force the *ex parte* temporary restraining order entered by the District Court on December 3, 1970, enjoining any action to conduct a recount in the election

for the office of United States Senator for the State of Indiana.

OPINION BELOW

The opinion of the District Court is reported and may be found in 321 F.Supp. 1370 (S.D. Ind. 1970) and in the Appendix, at p. 53.

JURISDICTION

Hartke's action for injunctive relief was brought in the District Court on December 3, 1970, pursuant to 28 U.S.C. § 1343(3) to enjoin the holding of an election recount on the ground that the Indiana election recount statutes were in conflict with the United States Constitution (Appendix p. 4). The three judge panel entered its order December 17, 1970, continuing in full force an earlier temporary restraining order granted by the District Court December 3, 1970 which enjoined the holding of the recount. (Appendix p. 50). Appellant's Notice of Appeal was filed December 18, 1970 in the District Court, Indianapolis.

This appeal was docketed in the Supreme Court on January 13, 1971 as No. 1232 and on January 15, 1971 as No. 1236. Jurisdiction was postponed on March 22, 1971, and both cases consolidated for hearing.

This Court has jurisdiction of this appeal under 28 U.S.C. § 1253.

Jurisdiction of this appeal exists notwithstanding any claims of mootness by reason of the seating of Plaintiff Hartke in the United States Senate. By unanimous consent of the Senate, Plaintiff Hartke received the oath "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice

to the outcome of any recount that the Supreme Court might order." Congressional Record, January 21, 1971, p. S4. Plaintiff has not been seated in any final sense. Appellants submit that upon these facts there is no basis for a finding of mootness because the Senate itself has declared that Plaintiff's seating was conditional upon the outcome of this specific case.

Moreover, not conceding the issue, but assuming for purposes of argument, that the cause was moot as to the interests of Appellant Roudebush, the lower court decision that the recount statute is unconstitutional is a severable issue and still beclouds the case. Under the principles of *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 433, 31 S.Ct. 288 (1911), retention of this appeal would be proper in light of the questions of public interest involved regarding the constitutionality of the recount procedure.

Courts of appeal generally retain jurisdiction of appeals despite claims of mootness where:

1. The question is likely to arise in the future unless settled by a court of last resort;

2. The validity of a statute is in question;

3. A final determination is necessary for the guidance of public officials;

4. There is a question involving an election;

5. It would be difficult or even impossible to get a final determination of the question because the case must necessarily become moot before the appeal can be heard. 132 A.L.R. 1185, 1189-1191.

The decision of this Court in *Powell v. McCormack*, 395 U.S. 486 (1969) supports the viability of this cause. There

it was held that Powell's claim to membership in the 90th Congress was not moot, despite the fact that the 90th session of Congress had terminated and Powell had actually been seated in the 91st Congress before this Court could hear the case.

The State of Indiana requires a final decision as to the constitutionality of its recount statute for the guidance of public officials in future elections. This is an issue of public importance aside from the rights of Appellant Roudebush to a recount of the votes. The District Court decision, if not reviewed, will cast doubt as to the proper course for election officials to follow in future elections.

QUESTIONS PRESENTED

1. Whether the District Court was prohibited from enjoining the recount proceeding in the state court by 28 U.S.C. § 2283.

2. Whether the Indiana Election Code providing for a recount in elections for the office of United States Senator conflicts with the constitutional prerogative of the Senate to judge the elections of its members, thereby prohibiting a recount in this case.

STATUTES INVOLVED

28 U.S.C. § 2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment".

The United States Constitution, Article I, Section 4 provides:

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof . . ."

The United States Constitution, Article I, Section 5 provides:

> "Each house shall be the judge of the elections, returns and qualifications of its own members, . . ."

The Indiana Election Code, Acts of 1945, ch. 208, §§ 324 to 340, as found in Burns' (1969 Repl.), §§ 29-5401 to 5417 provides:

> "Any candidate for any public officer voted upon at any election held within the State of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the conditions and in the manner and with the effect as in this article provided." Acts 1945, ch. 208, § 324; Burns' § 29-5401

Burns' (1969 Repl.), § 29-5414 provides for the legal effect of a recount:

> "When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court. Except for the offices of governor, lieutenant-governor, and members of the general assembly, such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such recount certificates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any

contest or other preceeding [proceeding] in which there is an issue as to the votes cast at such election for such office or offices."

The 1961 amendment to § 5414 provides:

"The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted as herein provided for the purpose of referring the information therein contained to the appropriate authorities. [Acts 1945, ch. 208, § 337, p. 680; 1961, ch. 313, § 4, p. 861.]"

STATEMENT OF THE CASE

On November 3, 1970, an election was held in the State of Indiana for the office of United States Senator. It was the closest senatorial election in Indiana history. The reported plurality was about one vote per precinct statewide. (4,383 votes; 4,440 precincts). Candidate Richard L. Roudebush petitioned the Marion County Superior Court for a recount in various enumerated precincts. (Appendix p. 8). Hartke moved to dismiss Roudebush's petition, but the motion was denied and the petition for a recount of the votes was granted. (Appendix p. 24).

Plaintiff-Appellee Hartke then filed in the U. S. District Court for Southern Indiana his Complaint for Injunctive Relief and Application for Temporary Restraining Order seeking to restrain operation of the recount statutes on the ground that they were in conflict with Article I, Section 5 of the United States Constitution. (Appendix p. 4). The same day Hartke's action in the District Court was filed, December 3, 1970, the judge granted the Temporary Restraining Order enjoining the defendant members of the recount commission from further proceeding. (Appendix p. 31).

On December 14, 1970, the Attorney General of Indiana moved to intervene as a party defendant pursuant to Rule 24, F.R.C.P., in order to defend the constitutionality of the Indiana Election Code recount provisions and subsequently moved the District Court to dismiss Hartke's complaint. (Appendix p. 44). On December 15, 1970, the District Court granted the Attorney General's motion to intervene as a party defendant. (Appendix p. 46).

On December 17, 1970, the District Court composed of a three judge panel convened to hear Hartke's application for injunction based upon the alleged unconstitutionality of the Indiana election recount statutes. The District Court determined the statutes to be unconstitutional with respect to the office of United States Senator. The District Court further found that to proceed with a recount "would work irreparable injury to the Plaintiff in that such action would compromise the integrity of the ballots, tally sheets, voting machines, and other paraphernalia of the election . . ." and ordered that the defendants and all those in active concert with them be enjoined from taking any action whatsoever pursuant to the provisions of Burns' (1969 Repl.) §§ 29-5401 to § 29-5417 to conduct a recount. (Appendix p. 51).

The Indiana Attorney General petitioned the District Court to stay its interlocutory order, but petition was denied December 18, 1970. The Attorney General then applied to this Court for a stay of the District Court order on December 18, 1970. This application was denied. (Appendix p. 72).

ARGUMENT

I

A. SECTION 28 U.S.C. 2283 PROHIBITED THE INJUNCTION GRANTED BY THE DISTRICT COURT

The injunction restraining the operation of the recount statutes was granted in contravention of 28 U.S.C. § 2283 which provides:

> "A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments".

Despite the mandatory language, the District Court found this statute to be "a statutory adoption of the doctrine of comity and hence discretionary in its application". (Appendix p. 57). Citing *Baines v. City of Danville* (4 Cir. 1964), 337 F.2d 579, the Court said that "special circumstances" justifying relief would allow a federal court to enjoin state court proceedings, despite what the Court acknowledged as the "absolute language" of § 2283. (Appendix p. 57). In *Baines,* it was noted that § 2283 was derived from the Act of March 2, 1793, 1 Stat. 335, which simply provided that no injunctions should issue from federal courts to stay proceedings in any state court. In 1948, the section was amended to include the provision for the three exceptions to its operation. In *Amalgamated Clothing Workers of America v. Richman Brothers Co.* 348 U.S. 511, 514, 75 S.Ct. 452, 99 L.Ed. 600, (1955), the

Supreme Court said "by the enactment (the revision which is now § 2283), Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation". In *Baines*, the Court of Appeals said:

> "In every case before the Supreme Court in which federal interference with state court proceedings has been premised upon asserted denials of civil rights, the Supreme Court has required or sanctioned federal forbearance. It has usually done so on the basis of considerations of equity and comity fashioned by it, but which are identical with those which underlie the statute. If judicial principles of equity and comity prevent federal stay of criminal proceedings in a state court, it is difficult to see how an unqualified congressional command to the same end can be ignored". 337 F.2d at p. 591.

Also in *Baines*, the court carefully decided that 42 U.S.C. § 1983, the civil rights statute, which provided for injunctive relief, did not make an exception to § 2283. Yet, reversing the tenor of its preliminary discussion, the Fourth Circuit commenced to fashion its own rule that § 2283 is inapplicable in cases where an injunction against state court proceedings is the only means of avoiding "grave and irreparable injury". This conclusion was buttressed by a theory of expedience: "Judicially fashioned rules are more malleable". 337 F.2d at p. 593. However, upon the facts in that case the Fourth Circuit held that injunctive interference with the state court proceedings was not warranted.

Baines is readily distinguishable from this case, for *Baines* involved a violation of the First Amendment rights of the Negro plaintiffs. The instant case involved no such claim under the Civil Rights Act.

While § 2283 does not bar federal injunctions against the *institution* of state court proceedings, *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 116, 14 L.Ed.2d 22 (1965), it bars all stays of proceedings already instituted unless one of the three statutory exceptions applies. The first exception in § 2283 is for cases where Congress has expressly authorized the federal courts to enjoin state court proceedings. (Therefore cases using 42 U.S.C. § 1983 to carve out exceptions to § 2283 are not in point because Plaintiff makes no claim under § 1983.) He is not proceeding under the Bankruptcy Act, in habeas corpus, or in removal. He seeks no injunction "expressly authorized by Act of Congress". His only claim to jurisdiction is under 28 U.S.C. § 1343 (3) which provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • • • •
>
> (3) To redress the deprivation, under color or any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States: • • • • •"

This statute does not provide Hartke with an express authorization for the injunction. Nor is Hartke able to bring himself within the second exception allowing injunctions "where necessary in aid of (the federal court's) jurisdiction". The third and final exception in § 2283 permits federal injunctions against state court proceedings "to protect or effectuate its judgments". There has been no judgment justifying protection and conferring injunctive powers in this case. Thus, none of the statutory exceptions to § 2283 is available to Hartke. The District

Court's avoidance of § 2283 is justified only upon its theory that "special circumstances justify such relief . . ." Here there is no such justification.

The District Court clearly adopted the "special circumstances" test as to whether § 2283 should be avoided. The court rejected the theory of *Cooper v. Hutchison,* 184 F.2d 119 (3 Cir. 1950), that 42 U.S.C. § 1983 created an exception to § 2283 in granting the injunctive power to federal courts in civil rights cases. The *Baines* case is the only authority cited by the District Court for its "special circumstances" test of the applicability of § 2283.

The District Court stated that abstention would not be proper where the state statute was clearly unconstitutional and incapable of a limiting construction. It cited *Harman v. Forsevius,* 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50, *Baggett v. Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed. 2d 377 and others. But none of these cases involved § 2283 and its anti-injunctive imperatives. The cases cited were appropriate where abstention, as a general desideratum, was purely discretionary and not compelled, as here, by an act of Congress. The cases are inapposite here, because the abstention of the District Court is compelled by statute. In the cases cited, no pending state court proceeding was enjoined. Bereft of these cases not involving § 2283 and bereft of the *Baines* case, which involved a Civil Rights Act claim, the District Court's decision is an unsupportable extension of federal jurisdiction.

In *Amalgamated Clothing Workers of America v. The Richman Brothers,* 348 U.S. 511, 75 S.Ct. 452, the Supreme Court considered a case where an employer had brought an action in a state court against a union which had been picketing its business outlets. The union then sought an

injunction in a federal court to prevent the employer from pursuing his remedy in the state court, claiming that the state court had no jurisdiction over the labor dispute. The Supreme Court, assuming that the state court had no jurisdiction, held that a federal injunction was prohibited by § 2283. It had been argued that § 2283 was inapplicable whenever it appeared that the state court was wholly without jurisdiction to proceed, the field having been preexempted by Congress. (This contention parallels the District Court's theory of "special circumstances" nullifying § 2283.) To this theory the Supreme Court replied:

> "This is not a statute conveying a broad general policy for appropriate *ad hoc* appliction. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions". 348 U.S. 515, 75 S.Ct. 455.

Against this clearly imperative language of the Supreme Court, the District Court in this case countered with the view that § 2283 was "discretionary in its application". (App. p. 57)

Subsequent to *Amalgamated*, this Court held in *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 116, 14 L.Ed.2d 22 (1965) that it was proper for a federal court to enjoin the bringing of a state criminal proceeding where the threatened prosecution of the criminal statute would have a "chilling effect" on free speech, which would constitute an irreparable injury to the plaintiff. But *Dombrowski* did not involve § 2283 because the state court proceeding was enjoined before it had even begun, and § 2283 prohibits only injunctions against pending state court proceedings. Because § 2283 was not applicable in *Dombrowski*, that case is of no aid to Plaintiff here.

Following *Dombrowski,* several lower federal courts have held that federal injunctive relief is warranted even where state court proceedings are pending *if* First Amendment rights are involved. Before it can be said that "special circumstances" exist which would enable a federal court to avoid § 2283, First Amendment rights must be involved. Moreover, the institution of the state court proceeding must be for the designed purpose of "chilling the First Amendment right". See eg., *Landry v. Daley,* 288 F.Supp. 200 (N.D. Ill. 1968) Federal intervention is not justified unless it is shown that enforcement of the state statute is being carried out in bad faith to harass an individual's exercise of protected freedoms. *Cameron v. Johnson,* 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed. 2d 182 (1968); *Landry v. Daley, supra.* In *Cameron,* this Court said:

> "Appellants case that there are 'special circumstances' establishing irreparable injury sufficient to justify federal intervention must therefore come down to the proposition that the statute was enforced against them, not because the Mississippi officials in good faith regarded the picketing as violating the statute, but in bad faith as harassing appellants' exercise of protected expression with no intention of pressing the charges or with no expectation of obtaining convictions, knowing that appellants' conduct did not violate the statute. We agree with the District Court that the record does not establish the bad faith charged. This is therefore not a case in which '. . . a federal court of equity by withdrawing the determination of guilty from the state courts could rightly afford (Appellants) any protection which they could not secure by prompt trial and appeal pursued to this Court'. *Douglas v. City of Jeanette,* 319 U.S. at 164, 63 S.Ct. at 881"; 390 U.S. at 619, 88 S.Ct. at 1340.

There has been no allegation of bad faith in the attempted recount procedure, nor could there be. There has been no allegation of a denial of First Amendment rights. There is no way § 2283 can be avoided under the facts of this case. The facts of this case do not constitute a *Dombrowski* exigency.

The decision of this Court in *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 90 S.Ct. 1739 (1970), is dispositive. There the union sought an injunction in federal court against enforcement of a state court injunction prohibiting union picketing. There it was noted that the underlying rationale of the anti-injunction statute was to prevent needless rivalry between the federal and state court systems whereby "litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success." 90 S.Ct. at 1743. As did the respondent in the *Atlantic Coast* case, the District Court "has intimated that the Act only establishes a 'principle of comity,' not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention." 90 S.Ct. at 1743. In *Atlantic Coast* this Court affirmed its previous decision in *Amalgamated Clothing Workers.* In *Atlantic Coast* this Court held

> "that any injunction against state court proceedings *otherwise proper under general equitable principles* must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunc-

> tions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." 90 S.Ct., at p. 1743 (emphasis added)

Further, this Court stated that "any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." 90 S.Ct. at 1748. In view of the *Amalgamated* and *Atlantic Coast* decisions, doubt as to the propriety of the injunction issued below is misplaced; the impropriety of the injunction is certain. Had the District Court entertained any doubt, it should have resolved its doubts in favor of abstention.

As the Court noted in *Atlantic Coast,* an injunction "otherwise proper under general equitable principles" must comply with § 2283 if it is to be upheld. The object of the next argument is to show that the grounds of equitable jurisdiction were not met in this case, aside from the prohibition of § 2283.

B. THERE IS NO IRREPARABLE DAMAGE JUSTIFYING AN INJUNCTION

At the time the District Court granted its injunction to Hartke, he was not threatened with irreparable damage by the recount proceeding pending in the Marion Superior Court. It is the general rule that "state officers may be enjoined, but only in a case reasonably free from doubt, and only if irreparable injury would result from the acts sought to be restrained . . . Injunction should not be

granted where other adequate remedies are available." 1 Barron and Holtzoff, Federal Practice and Procedure, § 46, p. 236-7; see also *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 116 (1965); *Younger v. Harris*, 91 S.Ct. 746 (1971).

Plaintiff had available adequate remedies other than a federal injunction. Yet the District Court expressed its belief that the case law of Indiana fully supported its holding that the recount statute was unconstitutional. If that were true, Plaintiff could have applied to the Indiana Supreme Court for a writ of prohibition.

The three Indiana cases cited by the District Court as supporting Hartke's case all involved applications for writs of prohibition.

> *State ex rel Acker, et al v. Reeves*, 229 Ind. 126, 95 N.E.2d 838 (1951);
>
> *State ex rel Beaman v. Circuit Court of Pike County, et al*, 229 Ind. 126, 95 N.E.2d 838 (1951);
>
> *State ex rel Batchelet v. Dekalb Circuit Court, et al*, 248 Ind. 481, 229 N.E.2d 798 (1967).

The Plaintiff Hartke could easily have done likewise and secured a speedy remedy in prohibition. In *Dombrowski*, federal intervention was premised upon facts where it was certain the plaintiffs would *not* be able to vindicate their First Amendment rights in the state courts. It was said:

> ". . . a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." 38 U.S. at 486, 88 S.Ct. at 1120.

But in the instant case, Hartke has a clear, quick remedy in the Indiana Supreme Court by writ of prohibition and alleges ample state authority for his constitutional claim.

The District Court expressed its belief that "like Humpty Dumpty, the seals on the ballots cannot be put back together again, if once destroyed, hence the frequent reason given for abstention—that all can be made right through state appellate procedures—does not apply". Yet all *can* be made right through state appellate procedures, procedures which the District Court did not recognize. This Court has previously written:

> "'The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the "gap" complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions. During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts." *Amalgamated,* 348 U.S. 511, at 518, 75 S.Ct. 452 at 456.

In addition to the state case law which the District Court said favored Plaintiff, the recount statute provides for the maintenance of the integrity of the ballots:

> "The court shall by order impound, and provide for the protection of all ballots and voting machines used at such election for casting votes for such office or offices in such precinct or precincts, together with all tally sheets relating thereto and all lists of the names and addresses of all persons registered by the clerk as having voted for such office or offices, and shall make the same available to said recount commission or to any contest commission appointed pursuant to section 351(a)(b) and (c) of this act." Acts 1945, ch. 208, § 336, amended, Burns' (1969 Repl.) § 29-5413.

Moreover, Burns' (1969 Repl.) § 29-5411 provides that "each candidate affected by such recount shall be entitled to have a watcher present at such recount and shall himself have the right to be present," and that "representatives of the press shall also be entitled to attend such recount." The conclusion of the District Court that a recount proceeding would wreak irreparable harm upon Hartke is not supported in logic, law, or fact.

As *Younger v. Harris* noted, there is a "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 91 S.Ct., at 749. These special circumstances will be found only where there is the threat of irreparable injury "both great and immediate." 91 S.Ct., at 751. While *Younger* was a criminal case, Appellants submit that its holding, 91 S.Ct. 755, "that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief" applies equally well to this case. As the dissenting opinion in *Perez v. Ledesma,* 91 S.Ct. 674 (1971) noted, at 699, "moreover, unlike the tax statutes, § 2283 is not directed to any particular class of

litigation, criminal or otherwise, but is designed to protect the process of orderly state adjudication generally."

Thus the latest pronouncements of this Court indicate that irreparable injury remains a requisite of the federal injunctive power.

The irreparable injury discussed most often in the injunction cases is that of a threat to First Amendment rights. However, no such threat is present in this case. The threat to First Amendment rights is usually discussed in a factual context of bad faith on the part of state officials and harrassment. But, nothing of the sort is present in this case. There is no irreparable injury of the *Dombrowski* genre involved.

The injunction was improperly granted by reason of the failure of Plaintiff Hartke to show irreparable harm of the "great and immediate" type which is required to overcome the long-standing policy against federal injunctions which halt orderly proceedings pending in state courts.

II

THE INDIANA RECOUNT LAW IS CONSTITUTIONAL

While Article I, Section 5 of the Constitution establishes each house as the judge of the elections of its members, Article I, Section 4 provides that "(t)he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof. . ." Appellants submit that the Indiana recount statute is a valid exercise of the power of the States to provide for the manner of holding elections. The Indiana recount statute is an integral part of the election process.

A recount stands on no different footing than the original count. If a recount is invalid as a derogation of the Senate's prerogatives, so is the original count. Were an original count proscribed, the Senate would have to appoint a staff of thousands to conduct the original count of the votes on the theory that the original count, if conducted by the States, would be in derogation of its right to be the judge of the elections of its members. But that is not the case. The original count is not considered as an infringement upon the Senate's right; neither should be the recount. Article I, Section 5 clearly vests the Senate with the *last* voice. All a recount can do is to verify the vote tally. It is a discovery procedure. The Senate can make whatever use of the tally it so desires.

Any "judgment calls" exercised by the members of the recount commission, as to paper ballots would be no more objectionable than the judgments made by the election officials on the first vote count. A recount serves as an integral part of the counting of the ballots and is merely part of the "manner" of holding the election, as provided for in Article I, Section 4.

Hartke has proposed that if a recount is invalid as to elections for seats in the state legislature, it is also invalid for the office of United States Senator. Under this reasoning, the 1961 amendment to § 29-5414, which made the results of a recount effective only to *refer* information to the appropriate authorities in recounts for the general assembly, should also apply to recounts for the Senate. Under the amendment to § 5414, recounts for the Senate should be accepted the same as state legislature recounts and the results of the recount would be of informational value only. There is no way that such a provision can derogate from the prerogatives of the Senate. In any

event, the Senate will still have the final decision in the matter, Under Article I, Section 5.

Even without the 1961 amendment adding the last paragraph to § 5414, the effect of the recount commission certificate is only "prima facie evidence of the votes cast for such office"; the Senate still would retain the power to judge for itself the elections of its members. Therefore, there is no conflict between the Indiana recount statute and Article I, Section 5 of the Constitution.

Appellant's position in this regard has received recent support in *Blackburn v. Hall,* 115 Ga.App. 235, 154 S.E.2d 392 (1967); *Wickersham v. State Election Board,* Okl., 357 P.2d 421, (1960) and *Odegard v. Olson,* 264 Minn. 439, 119 N.W.2d 717 (1963).

Of the three Indiana cases principally relied upon by the District Court, the first two, *State ex rel Acker et al v. Reeves,* 229 Ind. 126, 95 N.E.2d, 838 (1951) and *State ex rel Beaman v. Circuit Court of Pike County et al,* 229 Ind. 190, 96 N.E.2d 671 (1951), both concerned elections for the state legislature, not the United States Senate. Moreover, they were decided prior to the 1961 amendment to § 29-5414, which explicitly limited the office of the recount to that of an informative function and nothing more. The one case decided after the passage of the amendment, *State ex rel Batchelet v. Dekalb Circuit Court et al,* 248 Ind. 481, 229 N.E.2d 798 (1967) contained such a short opinion that it by no means affords Hartke the support claimed by the District Court. Moreover, in *Batchelet* it was decided that the case was moot.

It should also be noted that the conclusive effects claimed for *Acker* and *Beaman* are undercut by two cases decided the same year which held that the duties of the

recount commission are ministerial and the certificate of the recount commission is not an adjudication of the title to the office. *State ex rel McCormick v. Knox Superior Court*, 229 Ind. 118, 95 N.E.2d 829 (1951). A recount is in the nature of a bill of discovery. *Brown v. Grzeskowiak* 230 Ind. 110, 101 N.E.2d 639 (1951).

A recount should be distinguished from an election contest proceeding, which is provided for by separate statute. See Burns' (1969 Repl.) § 29-5501 to 5617. An election contest proceeding is more in the nature of an adjudication of title to the office contested. Those laws of Indiana which provide for election contests on the basis of irregularity, ineligibility, illegal votes, etc. exclude contests for Congressional seats. Burns' § 29-5601. Whatever the conflict between an election contest and Article I, Section 5 may be, there is no conflict as to a mere recount proceeding. Yet the District Court opinion erroneously uses the terms interchangeably (Appendix p. 58, 59) which further demonstrates the desirability of having this question of state law decided by a state court.

To summarize, the District Court erred because it granted an injunction prohibited by 28 U.S.C. § 2283 in a case which does not come within the exceptions to the anti-injunction rule, a rule which is based on settled principles of federalism. In addition, the injunction should not have been issued for the reason that Hartke would not have suffered irreparable harm had the recount proceeded. Also, the Plaintiff had a clear, speedy remedy at law in the state courts of Indiana by writ of prohibition. Finally, Hartke stated no claim justifying relief: a recount does not detract from the ultimate right of the United States Senate to judge the elections of its members. The Senate has the last word, and nothing in the Indiana

recount statute impairs the right of the Senate. The Indiana recount statute is constitutional.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the decision and order of the District Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

~~No. 1232~~ 70-66

RICHARD L. ROUDEBUSH,

Appellant,

vs.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The majority opinion of District Judges Steckler and Dillin (A. 53-68) and the dissenting opinion of Circuit Judge Stevens (A. 69-71) are reported at 321 F. Supp. 1370.

JURISDICTION.

The order of the court below, sitting as a three-judge district court under 28 U. S. C. §§ 2281 and 2284, granting, after notice and hearing, an interlocutory injunction restraining and enjoining appellant and others from taking any action whatsoever under the Indiana Election Code to conduct a recount of the votes cast for the office of United States Senator for the State of Indiana in Marion County, Indiana, or elsewhere, pending the determination of the action was entered as of December 17, 1970, at 5:45 P.M. (A. 50-52) The notice of appeal to this Court was filed in the district court on December 18, 1970. The jurisdictional statement was filed in this Court on January 13, 1971. On March 22, 1971, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. 28 L. Ed. 2d 321. The jurisdiction of this Court rests on 28 U. S. C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

This appeal involves Article 1, § 4, and Article 1, § 5, of the Constitution of the United States, 28 U. S. C. § 2283, and Article 27 of the Indiana Election Code (Acts 1945, Chapter 208, page 860, at pages 883 to 890, as amended by Acts 1961, Chapter 313, page 861, at pages 862 to 866). The pertinent text of these provisions are set forth in Appendix A, *infra*, pages A1-A11.

QUESTIONS PRESENTED.

I. Whether the interlocutory injunction appealed from is prohibited by the plain language of 28 U. S. C. § 2283.

II. If the interlocutory injunction appealed from is not prohibited by 28 U. S. C. § 2283, then:

A. Whether appellee Hartke failed to establish that he would suffer irreparable injury if the election recount proceedings in the state courts were not enjoined; and

B. Whether Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States, which makes the Senate the judge of the elections, returns and qualifications of its members.

STATEMENT OF THE CASE.

The material facts, as alleged in appellee Hartke's amended complaint (A. 36-40) and as recited in the opinion of the court below (A. 53-57), are not in dispute.

Appellee R. Vance Hartke and appellant Richard L. Roudebush were candidates for the office of United States Senator at the general election held in the State of Indiana on November 3, 1970. The canvass reflected that appellee Hartke received the highest number of votes cast for such office, and on November 16, 1970, the Secretary of State of Indiana certified him to the Governor of Indiana as duly elected. (A. 36; 53-54)

On November 17, 1970, appellant filed in the Superior Court of Marion County, Indiana, Room 3, a petition wherein he requested a recount of the votes cast for the office of United States Senator in certain specified voting precincts in said county. (A. 8-11) On November 19, 1970, appellee Hartke appeared in said proceeding and filed a motion to dismiss wherein he contended that the court lacked jurisdiction over the subject matter because of the alleged conflict of Article 27 of the Indiana Election Code with Article 1, § 5, of the Constitution of the United States. (A. 12-17) On December 1, 1970, the said court filed an opinion reaching the conclusion that the recount provisions of the Indiana Election Code do not conflict with the Federal or State Constitutions and overruled the motion to dismiss. (A. 18-23) Thereupon, the said court entered an order granting appellant's petition for recount of the votes cast for the office of United States Senator in the general election held on November 3, 1970, in the precincts specified, appointing appellees Samuel Walker, John R. Hammond and Duge Butler as the recount commission, and directing said commission to convene and commence the recount on December 8, 1970. (A. 24-26).[1]

On December 3, 1970, appellee Hartke filed his complaint in the court below wherein he alleged that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of

1. As judicially noticed by the court below (A. 54), appellant filed similar recount petitions in ten other counties of the State of Indiana. The courts involved are the Clark Circuit Court, Grant Superior Court, Lake Circuit Court, Superior Court of Madison County, Pike Circuit Court, Porter Superior Court, Ripley Circuit Court, St. Joseph Superior Court, Vigo Circuit Court and Wayne Circuit Court. Appellee Hartke appeared in each of the ten proceedings and filed a motion to dismiss on the same ground as his motion in the Superior Court of Marion County, Room 3. Prior to the filing by appellee Hartke of his complaint for injunctive relief in the court below, the Lake Circuit Court denied appellee Hartke's motion to dismiss.

United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States. Jurisdiction was predicated on 28 U. S. C. § 1343(3), and appellee Hartke further alleged that appellees Walker, Hammond and Butler, acting under color of state law, would, if not restrained and enjoined, convene and commence a recount of the votes cast for the office of United States Senator in the general election held on November 3, 1970, in the specified precincts in Marion County, thereby depriving appellee Hartke of the rights, privileges and immunities secured to him by Article 1, § 5, of the Constitution of the United States, and that appellant Roudebush, acting under color of state law, would, if not restrained and enjoined, seek to use and utilize the machinery and procedures provided in Article 27 of the Indiana Election Code in pursuing a recount in Marion County and elsewhere in the State of Indiana, and in challenging before the recount commission the determinations of precinct election boards theretofore made as to what ballots should be counted or not counted, as the case may be. The complaint contains neither an explanation of why appellee Hartke did not seek relief against the recount from the Supreme Court of Indiana nor an allegation of irreparable injury. The prayer of the complaint was that a three-judge district court be convened pursuant to 28 U. S. C. § 2284 to hear and determine the action, that the court declare Article 27 of the Indiana Election Code unconstitutional insofar as it provides a procedure for a recount of the votes cast for the office of United States Senator, and that interlocutory and permanent injunctions be issued restraining and enjoining appellees Walker, Hammond and Butler from convening and commencing a recount and restraining and enjoining appellant Roudebush from taking any actions to effect recount procedures under the Indiana Election Code. (A. 4-7) Upon the filing of the complaint, District Judge

S. Hugh Dillin entered a temporary restraining order without notice. (A. 31-32)[2]

On December 11, 1971, appellee Hartke filed an amended complaint containing the additional allegations that on December 3, 1970, the Governor of Indiana had issued to him a certificate of election, and that on December 4, 1970, said certificate had been delivered to the Clerk of the United States Senate. (A. 37) The amended complaint added an alternative prayer for relief that the court declare that the State of Indiana had divested itself of whatever authority and jurisdiction it may have possessed with respect to the election of a United States Senator by virtue of the certifications by the Governor and Secretary of State of Indiana that appellee Hartke had been elected to that office (A. 39), and a further alternative prayer that the court construe Article 27 of the Indiana Election Code to limit the recount of the votes for the office of United States Senator to a correction of arithmetical errors only and to deny any authority to the recount commissioners, or the court that appointed them, to make any further determination whatsoever as to which ballots should be counted or not counted, as the case might be. (A. 39-40)

On December 15, 1970, appellee Theodore L. Sendak, Attorney General of Indiana, was granted leave to intervene as a defendant. (A. 46)

On December 16, 1970, appellant Roudebush filed a motion to vacate the temporary restraining order on the ground that it was issued in violation of 28 U. S. C. § 2283 (A. 47), and a motion to dismiss the action on the grounds (1) that the court lacked jurisdiction of the subject matter and (2) that the complaint failed to state a claim against appellant upon which relief could be granted. (A. 48-49)

2. Appellee Hartke caused certified copies of the temporary restraining order to be filed in the ten other pending recount proceedings.

On December 17, 1970, appellee Hartke's request for an interlocutory injunction was heard by a three-judge district court composed of District Judges William E. Steckler and S. Hugh Dillin of the United States District Court for the Southern District of Indiana and Circuit Judge John P. Stevens of the United States Court of Appeals for the Seventh Circuit. By a 2-1 vote, the court held Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, to be unconstitutional (A. 53-71), and entered an order granting the interlocutory injunction requested by appellee Hartke. (A. 50-52)

After appellant's appeal was docketed in this Court, appellee Hartke moved to dismiss it on the ground that events occurring after the filing of appellant's jurisdictional statement have rendered the issues raised by the appeal moot. In the memorandum in support of his motion, appellee Hartke contended that appellant did not take any formal action before the United States Senate to contest the right of appellee Hartke to a seat therein, and that, as a result of the swearing in and seating of appellee Hartke on January 21, 1971, the United States Senate judged in favor of him as to the election of November 3, 1970, thus exercising its exclusive prerogative under Article 1, § 5, of the Constitution of the United States and rendering moot the controversy involved in this appeal. On March 22, 1971, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. 28 L. Ed. 2d 321.

THE QUESTION OF JURISDICTION.

The Court's order of March 22, 1971, postponing jurisdiction did not advert to the specific point to which counsel should address themselves. Accordingly, appellant will discuss (1) the Court's jurisdiction under 28 U. S. C. § 1253 to entertain this direct appeal from the district court, and (2) appellee Hartke's contention that subsequent events require that the appeal be dismissed as moot.

I. THIS COURT HAS JURISDICTION UNDER 28 U. S. C. § 1253.

The question whether this Court has jurisdiction under 28 U. S. C. § 1253 to entertain this direct appeal rests on whether the three-judge court below was properly convened. *Moody* v. *Flowers*, 387 U. S. 97 (1967).

Although cited neither in appellee Hartke's complaint (A. 38) nor in the opinion of the district court (A. 56-57), the authority to convene the three-judge court in this case would have to rest on 28 U. S. C. § 2281. Said section reads as follows:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Appellant submits that this case meets the requirements of the foregoing statute as interpreted by the decisions of this Court.

First, the complaint below contains requests for interlocutory and permanent injunctions against enforcement of a statute of the State of Indiana. (A. 39)

Secondly, the statute sought to be enjoined must be of general and statewide application. *Moody* v. *Flowers, supra.* In this case, appellee Hartke seeks to enjoin the operation of Article 27 of the Indiana Election Code insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, an office for which votes were cast in all voting precincts of the state. Although appellant has not requested a recount of the votes cast in all of the precincts of the state, he had the right to do so under the statute. As it is, the eleven counties in which he requested recounts are scattered throughout the state. In any event, the recounts in the eleven counties in question could change the outcome of the statewide race for the office of United States Senator.

Thirdly, the officer sought to be enjoined must be a state officer. A three-judge court need not be convened where the action seeks to enjoin a local officer unless he is functioning pursuant to a statewide policy and performing a state function. *Moody* v. *Flowers, supra.* In this case, the duty to enforce or execute the election recount statute is imposed upon the circuit and superior courts of the various counties.[3] By seeking to restrain appellant from taking any actions to effect recount procedures under

3. Most of the duties prescribed by the recount statute are ministerial in nature, although the judge does act judicially in some aspects of the proceeding. See *State, ex rel. Watson* v. *Pigg*, 221 Ind. 23, 46 N. E. 2d 232 (1943); *State ex rel. McCormick* v. *Superior Court of Knox County*, 229 Ind. 118, 95 N. E. 2d 829 (1951).

the Indiana recount statute (A. 39), the action thus is directed against the circuit and superior courts whose officers are charged with the execution of such statute. It is immaterial that the injunction is directed against the appellant and not formally against the eleven courts. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4 (1939); *Donovan* v. *Dallas*, 377 U. S. 408 (1964). The restraint of appellant effectively restrains the courts from executing the statute.[4] If the judges and clerks of the circuit and superior courts, and the recount commissioners appointed by the judges, are to be deemed local officers, they, nevertheless, function pursuant to a statewide policy and perform a state function with respect to the votes cast for the office of United States Senator.

Fourthly, the attack upon the state statute must be based "upon the ground of the unconstitutionality of such statute." In this case, appellee Hartke contends that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States (A. 38), and a majority of the three-judge district court so held. (A. 51)

Finally, irrespective of the existence of all other requirements, the complaint must set forth a cause of action upon which a federal district court can grant relief. A single federal judge has power to dismiss the complaint where it appears that so such relief can be granted. *Bailey* v. *Patterson*, 369 U. S. 31 (1962); *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U. S. 237 (1952). In this case, appellant contends that the court below was prohibited

4. Since the injunction also runs against appellees Samuel Walker, John R. Hammond and Dudge Butler, the recount commission appointed by the Superior Court of Marion County, Room 3, such court is directly restrained from proceeding with the recount in Marion County. (A. 39)

from granting injunctive relief by 28 U. S. C. § 2283, and also because there is a lack of equity jurisdiction in that appellee Hartke failed to plead irreparable injury or lack of an adequate remedy in the state courts. Appellant's contentions, of course, were rejected by the district court. If, however, appellant's contentions are correct, then this case is not one required to be heard and determined by a district court of three judges with the result that a direct appeal on the merits would not lie to this Court under 28 U. S. C. § 1253. But such a result would not prevent this Court from accepting jurisdiction of the appeal for the purpose of correcting the error of the district court in entertaining the action. *Bailey* v. *Patterson, supra; United States* v. *Corrick*, 298 U. S. 435 (1936). On the other hand, if appellant is wrong in his contentions regarding the applicability of 28 U. S. C. § 2283 and the lack of equity jurisdiction, then this Court has jurisdiction to reach the merits of the appeal and decide whether Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States.

II. THE APPEAL IS NOT MOOT.

Contrary to appellee Hartke's contention in support of his motion to dismiss this appeal, the swearing in and seating of him by the United States Senate on January 21, 1971, did not render moot the controversy raised by this appeal. By unanimous consent of the Senate, the oath was administered to appellee Hartke without prejudice to the outcome of this appeal and without prejudice to any recount that might be conducted. The relevant proceedings are recited in 117 Cong. Rec. S4 (daily ed. Jan. 21, 1971), as follows:

"ADMINISTRATION OF OATHS.

"The Vice President. The Senators to be sworn in will present themselves at the desk in groups of four, as their names are called by the clerk in alphabetical order.

"The clerk will call the names.

* * * * * *

"The legislative clerk called the names of Mr. Hartke, Mr. Hruska, Mr. Humphrey, and Mr. Jackson.

"Mr. Curtis. Mr. President, I ask unanimous consent that the oath may be administered to Mr. Hartke, of Indiana, without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order; and I further ask unanimous consent that a letter setting forth the details be printed in the Record.

"The Vice President. Without objection, it is so ordered."

The letter mentioned by Senator Curtis, and printed in the Record, makes specific reference to this appeal.

The significance of administering the oath of office to a senator-elect "without prejudice" is explained in Charles L. Watkins and Floyd M. Riddick, *Senate Procedure*, p. 240 (1958), as follows:

> "In recent years various Senators-elect against whom charges or petitions of contest or both were filed, have been sworn in without prejudice to either themselves or the Senate, and then the resolutions to exclude or affirm their membership in the Senate were disposed of by a majority vote at a later date."

For precedents involving the swearing in of senators-elect without prejudice, see *Senate Election, Expulsion and Censure Cases from 1789 to 1960*, S. Doc. No. 71, 87th Cong., 2d Sess. (1962) (hereinafter cited as "*Senate*

Cases''). The oath of office was so-administered to William Langer of North Dakota on January 3, 1941 (*Senate Cases*, p. 140), to John Marshall Butler of Maryland on January 3, 1951 (*Senate Cases*, p. 147), and to Dennis Chavez of New Mexico on January 3, 1953. (*Senate Cases*, p. 151)

In the case of William Langer, when he appeared to be sworn, Senator Barkley called the attention of the Senate to certain charges by citizens of North Dakota objecting to the administration of the oath to Langer. Senator Barkley stated that he had read the charges, that the charges referred to Langer's qualifications and fitness, and asked that Langer be permitted to take the oath ''without prejudice, which is a two-sided proposition—without prejudice to the Senator and without prejudice to the Senate.'' Upon parliamentary inquiry, the Vice President explained: ''If this agreement is entered into, only a majority of the Senate will be required to pass on the qualifications of the Senator-elect.'' (*Senate Cases*, pp. 140-141)

In the case of John Marshall Butler, Senator Millard E. Tydings, whom he had defeated, alleged unfair election practices and violation of federal and state election laws in the campaign. The oath was administered to Mr. Butler in accordance with a unanimous resolution, which read as follows:

> ''Mr. McFarland. Mr. President, I ask unanimous consent that when the oath required by the Constitution and prescribed by law is administered to Mr. John Marshall Butler as a Senator from the State of Maryland for the term beginning January 3, 1951, such action shall be deemed to be without prejudice either to him or to the constitutional right or power of the Senate to take any action it may subsequently deem proper, pending the outcome of the investigation now being made by the Committee on Rules and Administration through a subcommittee into the 1950 election in said State.'' (*Senate Cases*, p. 147)

In the case of Dennis Chavez, his defeated opponent, Maj. Gen. Patrick J. Hurley, requested an investigation, contending that the election laws had been violated. On January 3, 1953, Senator Taft requested that Senator Chavez should be permitted to take the oath and be seated without prejudice, and this was done. The contest was not finally disposed of until March 23, 1954. (*Senate Cases,* pp. 151-152)

In the light of the foregoing precedents, the Senate, in administering this oath of office to appellee Hartke without prejudice to the outcome of this appeal and without prejudice to any recount that might be conducted, clearly did not "judge" the election of November 3, 1970, in his favor.

Nor is the matter affected by the fact that appellant has not yet taken formal action before the United States Senate to contest the right of appellee Hartke to a seat therein. Under the Senate precedents, no rights are lost if a contest is not filed until after the oath has been administered to the contestee.

The Introduction to *Senate Cases* contains a discussion of the origin and procedure of contested election cases in the Senate. It is there stated as follows:

> "The Senate has never perfected specific rules for challenging the right of a claimant to serve, inasmuch as each case presents different facts. The practice has been to consider and act upon each case on its own merits, although some general principles have been evolved from the precedents established.
>
> • • • • •
>
> "The usual origin of such cases, however, is by petition. The contestant may file such a petition, protesting the seating of the contestee, and asserting his own right to the seat in question. *It is not required to be filed prior to the swearing-in of the contestee, and no rights are lost if filed afterwards.* • • •" (Emphasis added) (*Senate Cases,* pp. vii-viii)

The Senate cannot be deemed to have judged anything concerning appellee Hartke's right to retain his seat as against appellant until an issue has been presented, considered and voted upon by the Senate. Only then will such matter be deemed *res judicata*. See the cases of Graham N. Fitch and Jesse D. Bright of Indiana (*Senate Cases*, pp. 22-24), Francis W. Sykes v. George E. Spencer of Alabama (*Senate Cases*, pp. 60-61), and Henry A. DuPont of Delaware. (*Senate Cases*, pp. 86-87)

By reason of the foregoing, it is clear that a live controversy continues to exist between the appellant and appellee Hartke. Accordingly, the latter's motion to dismiss this appeal as moot should be denied.

SUMMARY OF ARGUMENT.

The interlocutory injunction issued by the district court should be reversed for three separate and equally valid reasons.

First, the injunction is prohibited by the plain language of 28 U. S. C. § 2283. The court below made no attempt to justify the injunction as falling within one of the three exceptions defined therein. Instead, it held that § 2283 embodies the doctrine of comity and hence is discretionary in its application. Such a view of the statute, however, has been rejected by this Court. Since the injunction appealed from is not expressly authorized by Act of Congress, or necessary in aid of the district court's jurisdiction, or to protect or effectuate its judgments, it cannot be sustained.

Secondly, even if the interlocutory injunction appealed from is not prohibited by 28 U. S. C. § 2283, and without

regard to the constitutionality of the recount provisions of the Indiana Election Code, such injunction must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances. No such circumstance is present in this case. Appellee Hartke not only had an opportunity to raise his constitutional claim in the state court proceedings, but he actually interposed the claim. Two courts ruled against him, and he failed to avail himself of the opportunity to obtain immediate review of these rulings by the Supreme Court of Indiana. Nor did appellee Hartke plead or prove that he would suffer irreparable injury if the injunction were not granted. Accordingly, the injunction appealed from violates settled equitable principles and cannot be sustained.

Thirdly, the Indiana recount statute does not conflict with the Senate's prerogative to judge the elections, returns and qualifications of its members.

1. There are essential differences between a recount and a contest under the Indiana Election Code. A recount is mainly a ministerial proceeding whereas a contest is a judicial proceeding. A recount does not finally decide the right to hold the office whereas a contest does. A recount is entirely independent of any kind of judicial review. Basically, the recount proceeding is a means of discovery, and it may or may not be followed by a contest.

2. Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, is a valid exercise of the power conferred on the State of Indiana by Article 1, § 4, of the Constitution of the United States. The subject matter of Article 1, § 4, is the "times, places and manner of holding elections for Senators and Representatives." This Court has held that these comprehensive words em-

brace authority to provide a complete code for congressional elections, and, therefore, it cannot be doubted that such a code can validly provide a method for a recount of votes as a part of the "manner of holding" the election.

3. Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, does not conflict with the provisions of Article 1, § 5, of the Constitution, which makes the Senate the judge of the elections, returns and qualifications of its members. The nature of the power conferred on the House and the Senate by this provision is judicial in character. Hence, it does not encompass election matters that are ministerial in character. The jurisdiction conferred by Article 1, § 5, does not attach until the election conducted pursuant to Article 1, § 4, has been concluded, and such election is not over until a timely petition for a recount of the votes has been disposed of. The Senate itself has impliedly recognized the validity and usefulness of state laws providing for a recount of the votes cast in senatorial elections. In point of fact, recounts of votes cast in congressional elections, conducted pursuant to the authority of state election statutes, have occurred frequently, and the constitutionality thereof have been upheld by various state courts.

ARGUMENT.

I. THE INTERLOCUTORY INJUNCTION APPEALED FROM IS PROHIBITED BY 28 U. S. C. § 2283.

The interlocutory injunction appealed from stays proceedings initiated by appellant in state courts located in eleven Indiana counties. Prior to seeking injunctive relief in the court below, appellee Hartke had appeared in each of the proceedings and filed a motion to dismiss challenging the jurisdiction of the various courts over the subject matter on the ground that the statute under which the courts were proceeding conflicts with Article 1, § 5, of the Constitution of the United States, and two of those courts had denied his motion. Instead of seeking writs of prohibition from the Supreme Court of Indiana to review these rulings, with further review, if necessary, by this Court, appellee Hartke sought relief in the court below.

Although 28 U. S. C. § 2283[5] does not preclude federal court injunctions against the institution of state court proceedings, *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), *Ex parte Young*, 209 U. S. 123 (1908), it most clearly bars all stays of proceedings already instituted, unless the case falls within one of the three exceptions specified therein.[6]

5. The text of this statute is set forth in Appendix A, *infra*, page A1.

6. This is by now too well settled to require extended discussion. The background and policy that led the Congress to pass the original anti-injunction statute in 1793 are discussed in *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118, 129-132 (1941). The statute in its present form dates from the revision of Title 28 of the United States Code in 1948. In *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U. S. 511 (1955), this Court, in

These exceptions permit injunctions to stay proceedings in a state court (1) where the injunction is expressly authorized by Act of Congress, (2) where the injunction is necessary in aid of the court's jurisdiction, and (3) where the injunction is necessary to protect or effectuate the court's judgments.

The court below made no attempt to justify the injunction as falling within one of the three exceptions written into the statute. Relying on a Fourth Circuit case,[7] it said:

> "* * * One view, which we find persuasive, is that Section 2283 is not a jurisdictional statute, but is rather, in essence, a statutory adoption of the doctrine of comity and hence discretionary in its application. In spite of its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances justify such relief. * * *" (A. 57-58)

Such a view of 28 U. S. C. § 2283 has been rejected by this Court. In *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281 (1970), it was said:

> "* * * The respondents here have intimated that the Act only establishes a 'principle of comity,' not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even

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discussing the 1948 revision, said: "By that enactment Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." (Page 514) The Court further said: "This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." (Pages 515-516) The Court again adhered to this position in *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281 (1970).

7. *Baines* v. *City of Danville,* 337 F. 2d 579 (4th Cir. 1964).

if that action cannot be justified by any of the three exceptions. We cannot accept any such contention. * * *" (398 U. S. at 286-7)

The express holding of this Court in the foregoing case was "that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld." (398 U. S. at 287) But this case does not fall within any of said exceptions.

The first exception in § 2283 deals with cases where the Congress has expressly authorized the federal courts to enjoin state court proceedings.[8] There is no suggestion in appellee Hartke's amended complaint that the injunction sought is expressly authorized by Act of Congress. It is merely alleged that the district court has jurisdiction pursuant to 28 U. S. C. § 1343(3).[9] (A. 36) Not only does § 1343(3) not expressly authorize the granting of an injunction to stay proceedings in a state court, but it requires that the action brought pursuant to the jurisdiction conferred be authorized by some other law. The amended complaint contains no citation to any statute that authorized the bringing of the action below.

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8. Examples of the statutory authorization include the various stay provisions contained in the Bankruptcy Act, 11 U. S. C. §§ 11a(15), 29a, 205(j), 403(c), 513, 516(4), 628(3), 714, 772, 814, 828, 877, 907, 1014 and 1062; interpleader cases, 28 U. S. C. § 2361; and habeas corpus cases, 28 U. S. C. § 2251.

9. This section reads as follows:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

The opinion of the court below pointed out that 28 U. S. C. § 1343 is the jurisdictional analogue to 42 U. S. C. § 1983.[10] (A. 58) The court later continued:

> "* * * It has been urged in recent cases arising under 42 U. S. C. § 1983 and brought pursuant to 28 U. S. C. § 1343 that Section 1983 itself furnishes a specific exception applicable to Section 2283, in that it specifically authorizes relief by '* * * suit in equity, or other proper proceeding for redress.' Indeed, it has been so held. *Cooper* v. *Hutchison*, 3 Cir., 1950, 184 F. 2d 119. In *Dombrowski, supra*, the Supreme Court found decision of this question unnecessary to its disposition of the case, and therefore declined to resolve it. It likewise specifically declined to resolve the question in *Cameron* v. *Johnson*, 390 U. S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182. The proposition therefore remains quite viable." (A. 65-66)

While the court below is correct in stating that the proposition adverted to remains viable,[11] it clearly is not applicable to the case at bar. The action below is not authorized by 42 U. S. C. § 1983, because the rights, privileges and immunities protected by § 1983 are those guaranteed by the Fourteenth Amendment. *Monroe* v. *Pope*, 365 U. S. 167

10. This section reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

11. See the concurring opinion of Mr. Justice Stewart in *Younger* v. *Harris*, ... U. S. ...., 27 L. Ed. 2d 669, 681-682 (1971). For a view that the phrase "suit in equity" does not of itself constitute an express authorization of injunctions against state court proceedings, see Note, *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1050-1051 (1965); Note, *Federal Power to Enjoin State Court Proceedings*, 74 Harv. L. Rev. 726, 738 (1961).

(1961);[12] *Johnson* v. *Stevenson*, 170 F. 2d 108 (5th Cir. 1948), *cert. denied sub nom. Stevenson* v. *Johnson*, 336 U. S. 904 (1949).

Inasmuch as the amended complaint alleges that the recount provisions of the Indiana Election Code conflict with Article 1, § 5, of the Constitution of the United States (A. 38), the jurisdiction of the district court to entertain the action can be sustained only under 28 U. S. C. § 1331 (a),[13] if at all. *See, Powell* v. *McCormack*, 395 U. S. 486 (1969). But § 1331(a) contains no provision expressly authorizing an injunction to stay proceedings in a state court.

The second exception in 28 U. S. C. § 2283 permits a federal court to grant an injunction against state court proceedings "where necessary in aid of its jurisdiction."[14] In order for this case to come within the second exception, the court below would have had to have exclusive jurisdic-

12. In the cited case, this Court noted that 42 U. S. C. § 1983 "came onto the books as § 1 of the Klu Klux Act of April 20, 1871. 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment." (365 U. S. at 171)

13. This section reads as follows:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

14. For example, in *in rem* proceedings a federal court may grant an injunction against proceedings that interfere with the control and disposition of the res. In removal cases, 28 U. S. C. § 1446(e) provides that the state court shall proceed no further unless and until the case is remanded, and the federal court may protect its jurisdiction by injunction. See the Reviser's Note to § 2283. Then there are the statutes that grant jurisdiction to the federal courts, exclusive of the courts of the states. Some examples are found in 28 U. S. C. §§ 1333, 1334, 1338, 1351, 1355, 1356 and 1583. In such instances, where a federal court has exclusive jurisdiction over the subject matter, it may restrain state proceedings that interfere with that jurisdiction.

tion over proceedings for recount of the votes cast for the office of United States Senator from Indiana. Only in such a situation could an injunction staying recount proceedings pending in the eleven Indiana courts be said to be necessary in aid of the district court's jurisdiction. But the district court has no jurisdiction whatsoever over a recount proceeding.

The Indiana Election Code, Burns' Ind. Stat. § 29-5403, specifies that "the candidate desiring a recount of votes shall file a verified petition or petitions therefor, as the case may be, in the circuit or in a superior court of the county or counties in which is located or are located the voting precinct or precincts in which he desires a recount of the votes cast for the office for which he or she was a candidate at such election." Since Article 1, § 3, of the Constitution of the United States provides that "No Person shall be a Senator * * * who shall not, when elected, be an Inhabitant of that State for which he shall be chosen," a recount proceeding can never be initiated in or removed to a federal district court on the ground of diversity of citizenship.

Appellee Hartke, of course, does not contend that a federal district court has jurisdiction to entertain a recount proceeding under the Indiana Election Code, for his contention is that exclusive jurisdiction over a recount of the votes cast for the office of United States Senator is vested in the Senate itself by virtue of Article 1, § 5, of the Constitution of the United States.[15] But an injunction in aid of the jurisdiction of the United States Senate cannot be deemed to be in aid of the jurisdiction of the district court. In *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U. S. 511 (1955), it was held that a federal district court was without power, in view of 28 U. S. C. § 2283, to

15. The relevant text is set forth in Appendix A, *infra*, page A1.

enjoin an action pending in a state court on the ground that the National Labor Relations Board had exclusive jurisdiction of the subject matter of the suit. In discussing the exception to § 2283 that permits a federal court to issue injunctions "where necessary in aid of its jurisdiction," this Court said:

> "* * * In no lawyer-like sense can the present proceeding be thought to be in aid of the District Court's jurisdiction. Under no circumstances has the District Court jurisdiction to enforce rights and duties which call for recognition by the Board. Such non-existent jurisdiction therefore cannot be aided." (348 U. S. at 519)[16]

The third exception in 28 U. S. C. § 2283 permits a federal court to grant an injunction against state court proceedings "to protect or effectuate its judgments." In other words, where a federal court has adjudicated a matter, it can protect or effectuate its judgment by enjoining, at the instance of the prevailing party, relitigation of the matter. The party prevailing in the federal court is not obliged to plead his federal judgment in the state court action and, if eventually unsuccessful, seek review of the adverse state judgment. But merely to state this third exception serves to demonstrate that this case does not fall within it. No judgment had been entered by the court below that the court could protect or effectuate.

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16. The Court went on to state that, insofar as protection is needed for the Board's exercise of its jurisdiction, Congress has specifically provided for resort, but only by the Board, to the district court's equity powers. (348 U. S. at 520) By contrast, since there is no statute authorizing the Senate, or its committees, to invoke the district court's equity power in aid of the jurisdiction of the Senate under Article 1, § 5, of the Constitution of the United States, a federal court could not grant injunctive relief even at the request of the Senate itself. See *Reed* v. *County Commissioners*, 277 U. S. 376 (1928).

As heretofore stated, in each of the eleven recount proceedings pending in the courts of Indiana, appellee Hartke filed a motion to dismiss raising the same constitutional question as presented by his complaint below. There is no reason to infer that the state courts are not as fair as the federal courts and as competent to decide the constitutional question presented. It was precisely for this reason that 28 U. S. C. § 2283 was enacted. In *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U. S. 281 (1970), this Court said:

> "• • • Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." (398 U. S. at 287)

For the foregoing reasons, the court below lacks jurisdiction over the subject matter of the action, because the injunctive relief sought by the complaint, and which the three-judge court below granted, is squarely prohibited by 28 U. S. C. § 2283.

II. APPELLEE HARTKE FAILED TO ESTABLISH THAT HE WOULD SUFFER IRREPARABLE INJURY IF THE RECOUNT PROCEEDINGS WERE NOT ENJOINED.

Even if the interlocutory injunction appealed from is not prohibited by 28 U. S. C. § 2283, and without regard to the constitutionality of the recount provisions of the Indiana Election Code, the injunction granted by the court below must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.

In *Younger* v. *Harris*, ____ U. S. ____, 27 L. Ed. 2d 669 (1971), this Court noted that, since the beginning of this country's history, Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. The Court went on to observe that there are two primary sources for this policy: One is the basic doctrine of equity that courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The other is the notion of "comity", which is a proper respect for state functions, a recognition of the fact that the entire country is made up of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. The Court then said:

> "This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions. * * *" (27 L. Ed. 2d at 676)

The holding of the Court in *Younger* was that a federal court must not enjoin pending state criminal proceedings except under extraordinary circumstances where the danger of irreparable injury is great and immediate, and that the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution. The Court further held that the possible unconstitutionality of a statute "on its face" does not in itself justify an injunction against good faith attempts to enforce it.[17] No reason suggests itself why

17. In *Samuels* v. *Mackell*, ... U. S. ....., 27 L. Ed. 2d 688 (1971), the Court held that declaratory relief is also improper when a prosecution involving the challenged statute is pending in state court at the time the federal suit is initiated.

the same equitable principles should not control the case at bar. Although the injunction below was not issued against a state criminal prosecution, the interest of the State of Indiana in the orderly administration of its election laws in no less great than in the orderly administration of the state's criminal laws.

Here appellee Hartke not only had an opportunity to raise his constitutional claim in the state court proceedings, but he actually interposed the claim. Two courts ruled against him, and he had the opportunity to obtain immediate review of these rulings by the Supreme Court of Indiana.[18] Thus, he had an adequate remedy in the state court that precludes federal equitable relief against the pending proceedings.

Moreover, in *Boyle* v. *Landry*, ... U. S. ....., 27 L. Ed. 2d 696 (1971), this Court held that the allegations of the complaint seeking injunctive relief against pending state proceedings must contain a showing of irreparable injury. In the case at bar, neither appellee Hartke's original complaint (A. 4-7) nor his amended complaint (A. 36-40) contains any allegation of any irreparable injury whatsoever. If the injunction in *Boyle* could not be sustained on the basis of allegations that the Court characterized as "flimsy", surely the injunction in the case at bar cannot be sustained in the absence of any allegation at all of irreparable injury.

The district court, however, has attempted to find irreparable injury by a process of reasoning that is specious at best. The majority opinion states:

> "* * * What defendants are threatening to do, and will do if not enjoined, constitutes an interference with

18. Burns' Indiana Statutes § 3-2201 provides:

> "* * * Writs of prohibition may also issue out of the Supreme Court of Indiana to such inferior courts to restrain and confine such inferior courts to their respective lawful jurisdiction."

the orderly processes of the recent election, and with the Constitutional prerogatives of the United States Senate. The plaintiff, as a candidate for re-election to that body, has a constitutional right to have the election contest, if there is to be one, held before the sole tribunal having jurisdiction in the premises, the Senate itself. It is essential to plaintiff's right that the integrity of the ballots cast at such election be preserved, *i.e.*, that they be held in their original envelopes, with the seals intact, and that the integrity of the tally sheets, voting machines, and other paraphernalia of the election likewise be preserved until such time as they may be called for by the Senate, so that no question may arise as to the character of the evidence which the Senate will be called upon to judge. *Plaintiff's rights will be irreparably harmed if such evidence is compromised, for which there can be no adequate remedy at law. The harm to be avoided will take place immediately, if not enjoined. Like Humpty Dumpty, the seals on the ballots cannot be put back together again, if once destroyed,* hence the frequent reason given for abstention—that all can be made right through state appellate procedures—does not apply." (A. 67) (Emphasis added)

The conclusion of the district court that appellee Hartke will sustain immediate and irreparable damage if the seals on the ballot bags and voting machines are broken cannot be supported.

First of all, the breaking of the seals on the voting machines and the ballots will not, *ipso facto,* compromise the integrity thereof. The recount statute[19] provides that "the court shall by order impound, and provide for the protection of all ballots and voting machines used at such election for casting votes for such office or offices in such precinct or precincts, together with all tally sheets relating thereto and all lists of the names and addresses of all per-

19. Burns' Indiana Statutes § 29-5413. Appendix A, *infra,* pages A7-A8.

sons registered by the clerk as having voted for such office or offices." Thus, the court in which the recount petition is filed is empowered to preserve the integrity of the election materials.

Secondly, if appellee Hartke disputes the results of the recount and can establish that the integrity of the election materials was compromised during the recount proceedings, it cannot be doubted that the Senate itself will protect his rights. Neither the original canvass nor the results of a recount are binding on the Senate, since it is the judge of the elections, returns and qualifications of its members. How, then, can appellee Hartke suffer irreparable injury if the seals in question are broken and a recount is conducted?

It is not the recount but the injunction issued by the district court that "constitutes an interference with the orderly processes of the recent election." The right to a recount of the vote is an integral part of the election processes under the Indiana Election Code. No federal court, which has not been reversed, has ever before meddled in the processes for the election of a member of the United States Congress. See *In re Voorhis*, 291 Fed. 673 (S. D. N. Y. 1923); *Keogh* v. *Horner*, 8 F. Supp. 933 (S. D. Ill. 1934); *Johnson* v. *Stevenson*, 170 F. 2d 108 (5th Cir. 1948), *cert. denied sub nom. Stevenson* v. *Johnson*, 336 U. S. 904 (1949); *Peterson* v. *Sears*, 238 F. Supp. 12 (N. D. Iowa 1964); *Manion* v. *Holzman*, 379 F. 2d 843 (7th Cir. 1967), *cert. denied*, 389 U. S. 976 (1967).

To summarize, the injunction appealed from violates settled equitable principles. No showing was made why appellee Hartke could not have obtained relief in the pending state court proceedings or from the Supreme Court of Indiana. Likewise, as a matter of law, no irreparable injury would have resulted to appellee Hartke if the interlocutory injunction had not been granted. The order grant-

ing the injunction, therefore, should be reversed without regard to the constitutionality of Article 27 of the Indiana Election Code.

III. THE INDIANA RECOUNT STATUTE DOES NOT CONFLICT WITH THE SENATE'S PREROGATIVE TO JUDGE THE ELECTIONS, RETURNS AND QUALIFICATIONS OF ITS MEMBERS.

The district court held that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States, which makes the Senate the judge of the elections, returns and qualifications of its members. (A. 65) In reaching this conclusion, the court relied on three poorly-reasoned cases involving recounts with respect to elections of members of the Indiana General Assembly. (A. 59-65)[20] Such cases, of course, can-

20. The cases in question are *State ex rel. Acker* v. *Reeves*, 229 Ind. 126, 95 N. E. 2d 838 (151); *State ex rel. Beaman* v. *Circuit Court of Pike County*, 229 Ind. 190, 96 N. E. 2d 671 (1951); and *State ex rel. Batchelet* v. *DeKalb Circuit Court*, 248 Ind. 481, 229 N. E. 2d 798 (1967). These cases, purporting to be following the earlier case of *Lucas* v. *McAfee*, 217 Ind. 534, 29 N. E. 2d 403, 588 (1940), hold that a recount of the votes cast for membership in the Indiana General Assembly violates Article 4, § 10, of the Constitution of Indiana, which provides: "Each House • • • shall • • • judge the elections, qualifications and returns of its own members." But *Lucas* does not support such a result. It involved both a recount and a contest. The recount was apparently conducted and concluded without controversy, but it did not change the votes received by the candidates sufficiently to affect the result. The holding of the case, which the court purported to be applying in *Acker*, *Beaman* and *Batchelet*, related to the court's jurisdiction to entertain the contest, not the recount. In *State ex rel. Gramelspacher* v. *Martin Circuit Court*, 231 Ind. 114, 107 N. E. 2d 666 (1952), the court partially retreated from its stand in *Acker* and *Beaman* by holding that a recount under the Indiana Election Code of the results of a primary election for party nomination for representative in the Indiana General Assembly is valid.

not control the constitutionality of the recount statute as it applies to the election of a United States Senator.[21]

With respect to the federal constitutional question, the court below merely stated that "the great weight of authority support's [appellee Hartke's] position that court proceedings for recount or contest with regard to an election for representative in the national House of Representatives or for United States Senator are unconstitutional, as in conflict with Article 1, Section 5, whether brought in state or federal court," and cited cases. (A. 58-59) However, it failed to draw any distinction between a statutory proceeding for a recount of the votes cast and a contest of the election. Such distinction is of controlling importance.

A. A statutory proceeding for recount of the votes cast is not a contest of the election under the Indiana Election Code.

The Indiana Election Code, Burns' Indiana Statutes §§ 29-2801 through 29-6003, is divided into 33 separate articles and covers all phases of the election process. Article 25 thereof, entitled "Counting Votes and Canvassing of Returns," Article 26, entitled "Certificates of Election", and Article 27, entitled "Recounting the Vote," are an integral unit, and together they specify how the results of all elections held pursuant to the Code are determined. The recount provisions of Article 27 are available to all candidates for all offices, including membership in the Senate of

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21. Burns' Indiana Statutes § 29-6001, which is a part of the Indiana Election Code, provides: "If any clause, sentence, paragraph or part of this act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph or part thereof which is directly involved in the controversy in which such judgment shall have been rendered."

the United States.[22] An election is clearly not over until a proper petition for a recount timely filed is disposed of.

A proceeding for a recount of the vote is not an adversary proceeding. The right to the recount is absolute.[23] The candidates affected by the recount do not participate therein except to the extent that "each candidate affected by such recount shall be entitled to have a watcher present at such recount and shall himself have the right to be present."[24]

Articles 28[25] and 29[26] make provision for the contest of elections. The contest must be for a cause specified in the statute, and any elector who was entitled to vote at the election is entitled to be the contestor.[27] The proceeding is adversary in character, and an appeal from the judgment entered lies to the Supreme Court of Indiana.

The essential differences between a recount and a contest under the Indiana Election Code are discussed in *State ex rel. McCormick* v. *Superior Court of Knox County*, 229 Ind. 118, 95 N. E. 2d 829 (1951), and in *State ex rel. Watson* v. *Pigg*, 221 Ind. 23, 46 N. E. 2d 232 (1943). Those cases point out that a recount is mainly a ministerial proceeding whereas a contest is a judicial proceeding. A recount does not finally decide the right to hold the office whereas a contest does. A recount is entirely independent of any kind of judicial review. Basically, the recount proceeding is a means of discovery, and it may or may not be followed by a contest. In summarizing the effect of the recount procedure, the court in *Pigg* said:

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22. Burns' Indiana Statutes § 29-5402, set out in Appendix A, *infra*, page A2.

23. *Id.* § 29-5401, *infra*, page A2.

24. *Id.* § 29-5411, *infra*, page A7.

25. *Id.* §§ 29-5501 through 29-5508.

26. *Id.* §§ 29-5601 through 29-5617.

27. By contrast, only a candidate can file a petition for a recount under Article 27.

"The canvass and return are to be performed by the commission, a ministerial body, whose count supersedes and is substituted for the canvass and return of another ministerial body, the election board. The statute thus permits a second count (with logical consequences) at leisure, open to the candidates, their 'watchers' and 'representatives of the press,' by persons appointed by a judge who is assumed to be impartial, to supersede the original count made in the haste and excitement of election by boards composed of partisans. All the cost of the recount must be paid by the petitioning candidate or candidates. If the satisfaction of obtaining such a ministerial review is worth the price to the candidate, we see no reason why it should not be granted. If in the course of the proceeding matters are discovered which to either of the parties seems to require judicial review and determination, the remedy of *quo warranto* is available. Unless so reviewed, the result of the recount is final. This does no violence to any principles of public policy nor is it within any inhibition of the Constitution so far as we are now advised." (221 Ind. at 35)

B. Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, is a valid exercise of the power conferred on the State of Indiana by Article 1, § 4, of the Constitution of the United States.

Article 1, § 4, of the Constitution of the United States provides as follows:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Article 1, § 4, was a compromise between those delegates to the Constitutional Convention who wanted the States to

have final authority over the election of all state and federal officers and those who wanted Congress to make laws governing national elections.[28] In discussing this provision, *The Federalist No. 59* (Hamilton) states:

> "* * * They [the convention] have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety."

In discussing the scope of Article 1, § 4, this Court in *Smiley* v. *Holm*, 285 U. S. 355 (1932), said:

> "* * * The subject matter is the 'times, places and manner of holding elections for Senators and Representatives.' It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. * * *" (285 U. S. at 366)

While this Court in *Smiley* did not specifically mention recounting the votes after the initial count, the language it used is sufficiently broad enough to indicate that either the States or the Congress could establish a method for a recount of the votes as a part of the "manner of holding" the election.

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28 See footnote 2 to the opinion of Mr. Justice Black announcing the judgment of the Court in *Oregon* v. *Mitchell*, ... U. S. ...., 27 L. Ed. 2d 272 at 278 (1970).

The same conclusion can also be drawn from language in *United States* v. *Classic*, 313 U. S. 299 (1941), where this Court said:

> "* * * The primary, as is the general election, is subject to numerous statutory regulations as to the time, place and manner of conducting the election, including provisions to insure that the ballots cast at the primary are correctly counted, and the results of the count correctly recorded and certified to the Secretary of State, whose duty it is to place the names of the successful candidates of each party on the official ballot. * * *" (313 U. S. at 311-312)

The very purpose of Article 27 of the Indiana Election Code, in providing for "Recounting the Vote," is to insure that the votes cast are correctly recorded and certified. Accordingly, since the States have been given the authority by Article 1, § 4, to prescribe all steps necessary to complete the elective process, subject to the overriding power of Congress to alter such regulations, it cannot be doubted that either the Senate or the House would accept the final tally of the vote for Senator or Representative after a recount as well as it would accept the original tally without a recount.

C. Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, does not conflict with the provisions of Article 1, § 5, of the Constitution, which makes the Senate the judge of the elections, returns and qualifications of its members.

There does not seem to have been any discussion concerning Article 1, § 5, of the Constitution of the United States[29]

29. The relevant text is set forth in Appendix A, *infra*, page A1.

in the Constitutional Convention.[30] But the nature of the power conferred on the House and Senate by this provision is judicial in character. *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597 (1929). Accordingly, it should not be extended to encompass election matters that are merely ministerial in character.

In holding that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, is in conflict with Article 1, § 5, of the Constitution of the United States, the court below has misapplied that provision of the Constitution. Article 1, § 5, says that each house shall be the *judge* of the elections, returns and qualifications of its own members. It does not say that each house shall *count* the votes cast at such election, a ministerial function. Indeed, if the district court's position that Article 1, § 5, forbids a recount of votes for members of the United States Senate were to be accepted, then it logically follows that it forbids the initial count of such votes as well. The State's jurisdiction under Article 1, § 4, to prescribe the "manner of holding elections" would end once the polls were closed, and the Senate would have to tally the vote. But the Constitution does not contemplate such an absurdity. The jurisdiction conferred on the Senate by Article 1, § 5, does not attach until the election conducted pursuant to Article 1, § 4, has been concluded, and such election is not over until

30. This provision apparently had its origin in the practice of the House of Commons of the British Parliament. In the reign of Elizabeth I the Commons claimed the right to determine questions of disputed elections, and in 1604, during the reign of James I, they insisted upon it. Although the Commons exercised this jurisdiction for more than 250 years, its experience was not satisfactory, and in 1868 its jurisdiction to decide questions of controverted elections was assigned by 31 & 32 Vict. c. 125 to the courts of law. See, Sir William R. Anson, *The Law and Custom of the Constitution, Part 1, Parliament* (3rd Ed. 1897), pages 162-166.

a timely petition for a recount of the votes has been disposed of.

The Senate itself has impliedly recognized the validity and usefulness of state laws providing for a recount of the votes cast in Senatorial elections. In the case of *Herbert R. O'Conor* v. *D. John Markey* of Maryland (*Senate Cases*, pp. 144-145), which arose out of the election of November 5, 1946, a recount of the votes cast was conducted by the Subcommittee on Privileges and Elections. In the report submitted by the full Committee on Rules and Administration,[31] it was pointed out that the recount was conducted because Maryland law made no provision therefor. The said report states:

> "* * * In view of the fact that 'the laws of Maryland make no provision for a recount of votes cast in a general election for United States Senator,' contestant requested 'the Senate to employ its power and authority for the purpose of effecting a fair and lawful recount of all ballots cast at said election.'
>
> * * * * *
>
> "*The special committee, having first ascertained that the laws of the State of Maryland did not, in fact, provide for a recount as desired by contestant,* forthwith dispatched investigators to make a verification check on all voting machines used in that election in the State of Maryland. * * *" (Emphasis added) (Pages 1-2)

The implication from the foregoing statement is clear that, if Maryland law had made provision for a recount, it would have been unnecessary for the Senate to conduct the recount, and that a recount pursuant to the state law would have been proper.

In point of fact, recounts of votes cast in Congressional elections, conducted pursuant to the authority of state elec-

31. S. Rept. No. 1284, 80th Cong., 2d Sess. (1948).

tion statutes, have occurred frequently. One that was widely covered by the media arose out of the general election held on November 5, 1968, when Robert Packwood defeated Wayne Morse for the office of United States Senator from Oregon. Morse sought a recount of the votes under the Oregon election laws, and the same was had. Apparently, no reported challenge was made to the legality of the recount proceeding.

A recount was also had after the Nevada senatorial election of 1964, as appears from the case of *Laxalt* v. *Cannon*, 80 Nev. 588, 397 P. 2d 466 (1964). That case involved an election contest, which was dismissed by the court on the ground that exclusive jurisdiction was vested in the United States Senate under Article 1, § 5, of the Constitution. However, it appears from the opinion that, prior to the filing of the contest, a recount had been conducted without objection. In this regard, the opinion states:

> "* * * The Canvass showed Cannon to have won the election by a narrow margin. *Laxalt made timely demand for a recount of the vote (NRS 293.403), and a statewide recount was conducted over a three-day period and completed on December 2, 1964. The recount also showed Cannon to have won the election by a narrow margin, though slightly greater than before.* On December 3, 1964, Laxalt filed a statement of contest with this court (NRS 293.407). On December 4, 1964, Governor Sawyer issued a certificate of election to Senator Cannon (NRS 293.395 (3)). Subsequently, Senator Cannon filed a motion to dismiss this election contest, contending that this court does not have jurisdiction to decide it. * * *" (Emphasis added) (397 P. 2d at 466)

The validity of state recount statutes have been specifically upheld in cases involving elections to the House of Representatives of the United States Congress. In *Wickersham* v. *State Election Board*, 357 P. 2d 421 (Okla.

1960), the Supreme Court of Oklahoma, in a well-reasoned opinion, said:

> "We are of the opinion that, where the right to a recount of votes cast for a particular office is not granted by statute, a proceeding that has for its purpose the matter of recounting the votes in fact 'constitutes a challenge to the title to the office' (at page 760, 85 P. 2d) and is therefore an action in the nature of quo warranto to try the right or title to the office. In such cases all of the election processes have been carried out before the proceeding is filed and for said reason Congress alone has exclusive jurisdiction and it alone can grant relief. On the other hand, *where, as a part of the election proceedings, a recount is provided for in proper instances, an election cannot be considered as over or final until a recount is allowed, and until the election is final, the courts can and should exercise jurisdiction for the purpose of requiring the lower tribunals to comply with the election statutes.* • • •
>
> "In view of the fact that our recount statute (Sec. 392, supra) is an integral part of our election laws, and in view of the further fact that an election in our opinion is not over or final until a proper application for a recount timely filed is disposed of, *there are no substantial grounds for distinguishing the right to a recount in a proper case from a right to a count of the votes in the first instance.*
>
> "Respondents and intervenor contend that since Congress, under the provisions of Art. 1, Sec. 5, supra, is the ultimate judge 'of its own Members' it may refuse to seat petitioner notwithstanding a recount of the votes may show that he in fact received more votes than Wheeler. Although Congress may have such power, we do not agree with respondents' suggestion that to accept jurisdiction herein and grant relief we will be doing a vain or futile thing. We are not convinced that Congress will refuse to recognize the result of a recount or a Certificate of Election issued in accordance with the recount. • • •" (357 P. 2d at 424-5) (Emphasis added)

Similar views were expressed in the concurring opinions in *Odegard* v. *Olson*, 264 Minn. 439, 119 N. W. 2d 717 (1963). In that case the petitioner had commenced proceedings to contest the election for the office of U. S. Representative pursuant to the provisions of 2 U. S. C. §§ 201 through 226, and then sought an injunction in the Supreme Court of Minnesota to prevent the secretary of state of Minnesota from issuing a certificate of election to his opponent pending final determination of the contest in the U. S. House of Representatives. The court held that it had no jurisdiction to issue the injunction. In concurring, Chief Justice Knutson pointed out that, although Minnesota did not have a recount statute, it had the constitutional power to enact one, saying:

> "U. S. Const. art. I, § 4, which provides that the 'Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,' clearly grants to the states the power to prescribe the manner of electing Senators and Representatives to Congress. This right, however, is circumscribed by art. I, § 5, which reads in part: 'Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.' By legislation, Minnesota, as well as every other state of the Union, has provided the machinery for electing members of Congress. In view of that fact, it is not accurate to say that we have no jurisdiction over elections. *It is more proper to say that the states have been given the authority to prescribe all steps necessary to complete the elective process, subject to the overriding power of Congress to determine who has been properly elected and to refuse to seat one who is determined not to have been properly elected. Within the scope of the elective process, our legislature could have provided for a recount of the votes under supervision of our courts when the original tabulation was questioned by one of the*

candidates. If it had done so as part of the elective process, as many of the other states have done we do not doubt that Congress would accept the final tally of the vote after a recount as well as it would accept the original tally without a recount.'' (Emphasis added) (119 N. W. 2d at 721)

Blackburn v. *Hall*, 115 Ga. App. 235, 154 S. E. 2d 392 (1967), upheld the recount procedure under the Georgia Election Code as applied to the election of a representative to the United States Congress. The court adopted and followed the reasoning of the Supreme Court of Oklahoma in *Wickersham* v. *State Election Board, supra.*

Accord, Rice v. *Power*, 19 N. Y. 2d 196, 224 N. E. 2d 865 (1967) (involving election for office of delegate to the New York Constitutional Convention).

In the light of the foregoing authority, it is clear that the recount provisions of the Indiana Election Code are valid and constitutional as applied to the election of a United States Senator.

CONCLUSION.

The order of the district court granting the interlocutory injunction appealed from should be reversed and the cause remanded to the district court with directions to dismiss the action.

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APPENDIX A.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The pertinent text of Article 1, § 4, of the Constitution of the United States reads as follows:

> "Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

The pertinent text of Article 1, § 5, of the Constitution of the United States reads as follows:

> "Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, * * *."

The text of 28 U. S. C. § 2283 reads as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The text of Article 27 of the Indiana Election Code (Acts 1945, Chapter 208, page 680, at pages 883 to 890, as amended by Acts 1961, Chapter 313, page 861, at pages 862 to 866), as it appears in Burns' Indiana Statutes, §§ 29-5401 through 29-5417, reads as follows:

Article 27—Recounting the Vote.

29-5401. Elections—Right of candidate to recount of votes.—Any candidate for any public office voted upon at any election held within the state of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county of counties, as the case may be, under the conditions and in the manner and with the effect as in this article [§§ 29-5401—29-5417] provided. [Acts 1945, ch. 208, § 324, p. 680.]

29-5402. Right of recount—Candidates entitled—Application to voting precincts.—The right of recount provided in this article [§§ 29-5401—29-5417] shall be available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipality, county, district, judicial, legislative, and state elective office and candidates for membership in the House of representatives and in the senate of the United States; and such right of recount may by any candidate be exercised with respect to one [1] or several or all of the voting precincts in which votes were cast for the office for which he was a candidate. [Acts 1945, ch. 208, § 325, p. 680.]

29-5403. Petition for recount—Verification—Filing—Cross-petition by candidate elected—Time in which cross-petition must be filed.—The candidate desiring a recount of votes shall file a verified petition or petitions therefor, as the case may be, in the circuit or in a superior court of the county or counties in which is located or are located the voting precinct or precincts in which he desires a recount of the votes cast for the office for which he or she was a candidate at such election, or before the judge of any such court in vacation and each such petition shall specify the voting precinct or precincts within the county in which the petition is filed in which such recount is desired; such

petitions for the recount of votes cast at an election shall be filed within fifteen [15] days after the day on which such election was held: Provided, That any candidate, who, on the face of the election returns is elected to any office at such election, shall be permitted to file a cross-petition or cross-petitions for a recount within twenty-five [25] days after the day on which said election is held and each such cross-petition shall specify the voting precinct or precincts within the county in which the cross-petition is filed in which such recount is desired. If a petition for recount is filed for an office for which voters in more than one county vote a cross-petition for a recount may be filed in a county or counties in addition to the one in which the first petition was filed: Provided, That such cross-petition or cross-petitions for a recount shall be filed within twenty-five [25] days after the day on which said election is held and that such cross-petition or cross-petitions shall ask for a recount of all votes cast for such office in the second or more counties; Provided, further, That in the case of a state-wide elective office, if more than two [2] counties are involved through petition or cross-petition, the petitioner and cross-petitioner shall each bear ten per cent [10] of the costs occasioned by the recount, and the remainder of said cost shall be appropriated and paid from the general fund as other expenditures of the state of Indiana, notwithstanding any other provisions of the Acts of 1945, chapter 208. If on either such day the court shall be in vacation the petition or cross-petition shall be deemed duly filed in time if filed in the office of the clerk of the court, but no such petition shall be granted and no recount ordered until after such twenty-fifth day following such election unless the defendant or defendants to the petition or petitions file a written waiver or waivers of their right to file a cross-petition or cross-petitions as provided in this article [§§ 29-5401—29-5417]: Provided, further, That the filing of a cross-petition is discretionary and not obligatory and failure to file either a cross-petition or an answer shall

not be construed as an admission of the truth of the allegations of the petition for a recount nor shall it give rise to any presumption in favor thereof. [Acts 1945, ch. 208, § 326, p. 680; 1961, ch. 313, § 2, p. 861.]

29-5404. Candidates may join in petition for recount —Consolidation of petitions for recount.—Two [2] or more candidates for the same or different offices voted upon at the same election may join in such petition or petitions for recount. If more than one [1] petition for recount is filed in any county within fifteen [15] days following an election, whether in the same court of such county or not, such petitions shall be ordered consolidated under the petition first filed, and if a transfer of petitions from one court of such county to another court of such county is necessary to effect such consolidation such transfer shall on motion be ordered by the court in which the subsequent petition or petitions were filed, or the judge thereof in vacation. [Acts 1945, ch. 208, § 327, p. 680.]

29-5405. Petition for recount — Contents — Term "contest" defined—Amendment of petition.—Each such petition shall state the office and the precinct or precincts within the county in respect of which the petitioner desires a recount; that he was a candidate at such election for such office and that the office was voted upon in the precinct or precincts specified; the name and post-office address of petitioner's opposing candidate or candidates; that the petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that the petitioner desires to contest said election in respect of said office, or that the petitioner desires to prepare for a contest in respect of such office which he has reason to believe will be instituted against him; and that he desires a recount of all of the votes cast for such office in such precinct or precincts. The term "contest" as used in this section shall include all forms of contest herein or hereafter recognized as appropriate means for contesting title to a public office.

The court in which such petition is filed or the judge thereof in vacation may allow such petition to be amended at any time upon such terms and conditions as the court or judge may order. [Acts 1945, ch. 208, § 328, p. 680.]

29-5406. Cross-petition—Contents—Amendment of cross-petition.—Each such cross-petition shall state the office and the precinct or precincts within the county in respect of which the cross-petitioner desires a recount; that he was a candidate at such election for such office and that the office was voted upon in the precinct or precincts specified; the name and post-office address of the cross-petitioner's opposing candidate or candidates; that the cross-petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that he desires a recount of all of the votes cast for such office in such precinct or precincts. The court in which such cross-petition is filed or the judge thereof in vacation may allow such cross-petition to be amended at any time upon such terms and conditions as the court or judge may order. [Acts 1945, ch. 208, § 329, p. 680.]

29-5407. Notice of filing and pendency of petition—Duty of clerk to issue notice—Duty of sheriff.—Upon the filing of such petition, the clerk shall issue a notice of such filing and pendency of such petition to the opposing candidate or candidates and deliver the same to the sheriff or sheriffs of the county or counties in which such opposing candidate or candidates reside; and said sheriff or sheriffs shall immediately serve the same upon such opposing candidate or candidates in person or by leaving a copy at his or their last and usual place of residence and shall make immediate return of such service. [Acts 1945, ch. 208, § 330, p. 680.]

29-5408. Bond for payment of costs.—Each petitioner shall furnish a cash deposit or file an undertaking with corporate surety to the approval of the

court for the payment of all costs of such recount, the minimum amount of which shall be one hundred [$100] dollars. Should the number of precincts to be counted exceed ten [10], the amount of the deposit or bond, as the case may be, shall be increased by ten dollars [$10] for each and every precinct in excess of ten [10]. Any unexpended balance remaining in any deposit after payment of all the costs occasioned by the recount proceedings shall be returned to the depositor: Provided, That where the petition is joint a joint undertaking may be furnished: Provided, however, That in the event a cross-petition is filed then the petitioner or petitioners and the cross-petitioner or cross-petitioners shall either furnish cash deposits or file undertakings with corporate surety to the approval of the court for the payment of his or their proportionate share of the cost of such recount as hereinafter provided: Provided, That where the cross-petition is joint a joint undertaking may be furnished. [Acts 1945, ch. 208, § 331, p. 680.]

29-5409. Granting petition and cross-petition—Appointment of recount commission.—Upon the filing of such petition and undertaking, the court or the judge thereof in vacation shall, upon the expiration of twenty-five [25] days after such election and upon proof of service of said notice or notices, grant such petition and cross-petition or cross-petitions as may have been filed and order the recount of such votes in such precinct or precincts, and if there is a consolidation of such petitions and cross-petitions, the court shall by consolidated order grant such consolidated petitions and cross-petitions and shall order a consolidated recount of all votes in all precincts in such county specified and requested in such petitions and cross-petitions. In either case the court or the judge thereof in vacation shall appoint a recount commission of three [3] members to make the recount or recounts ordered, and the commission shall in the same process recount all of the votes ordered recounted. [Acts 1945, ch. 208, § 332, p. 680.]

29-5410. Recount commission — Qualifications of members—Compensation.—If any of the votes to be recounted were cast by means of voting machines, one [1] member of the recount commission shall be a competent mechanic who is familiar with such voting machines. All of such commissioners shall be voters, qualified to vote at such election and two [2] of such commissioners shall be selected from the two [2] opposite political parties which cast the highest and next highest votes in this state for secretary of state at the last preceding general election. Each member of the commission shall receive ten dollars [$10.00] for each day while actually engaged in making such recount. The cost of such recount shall be paid by each petitioner or cross-petitioner, as hereinafter provided. [Acts 1945, ch. 208, § 333, p. 680.]

29-5411. Duty of commission—Watchers—Representatives of press entitled to attend.—On a day, not sooner than five [5] days after the recount is ordered, and at a place to be fixed by order of the court, such commission shall convene and commence such recount and shall expeditiously complete the same. Each candidate affected by such recount shall be entitled to have a watcher present at such recount and shall himself have the right to be present. Representatives of the press shall also be entitled to attend such recount. [Acts 1945, ch. 208, § 334, p. 680.]

29-5412. Duty of clerk when order of recount is made and entered by court.—On the day when the order of recount is made and entered by the court, the clerk of the circuit court shall, by registered United States mail, mail a certified copy of such order to each opposing candidate named in such petition at the address therein given, and shall tax the cost thereof to the petitioner. [Acts 1945, ch. 208, § 335, p. 680.]

29-5413. Protection of ballots, voting machines, tally sheets and other papers—Duty of court.—The court shall by order impound, and provide for the protection of all ballots and voting machines used at

such election for casting votes for such office or offices in such precinct or precincts, together with all tally sheets relating thereto and all lists of the names and addresses of all persons registered by the clerk as having voted for such office or offices, and shall make the same available to said recount commission or to any contest commission appointed pursuant to section 351 [§ 29-5603] (a) (b) and (c) of this act [chs. 28-60 of this title]. [Acts 1945, ch. 208, § 336, p. 680; 1961, ch. 313, § 3, p. 861.]

29-5414. Completion of recount—Certificate of commission—Filing—Duty of clerk—Effect of certificate—Procedure when recount for office of governor, lieutenant-governor, and members of general assembly.—When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court.

Except for the offices of governor, lieutenant-governor, and members of the general assembly, such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such recount certificates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any contest or other preceeding [proceeding] in which there is an issue as to the votes cast at such election for such office or offices.

Upon a recount for the office of governor or lieutenant-governor, each clerk of the circuit court shall, on the day following the completion of the recount, make out, at full length, two [2] certified statements, under the seal of the clerk of the circuit court, of the number of votes each candidate received; one [1] of which he shall transmit to the speaker of the house of repre-

sentatives of the next general assembly, by its senator or representative, who shall deliver the same to such speaker on the first day of the session and the other certified statement shall be transmitted by registered mail to Indianapolis, directed to said speaker, and to the care of the secretary of state, by whom the same shall be delivered to the speaker on the first day of the session.

If a recount is had in respect to votes cast for senator or representative in the general assembly, each clerk of the circuit court, on the day following the completion of the recount, shall make and certify two [2] statements showing the total number of votes each candidate received; he shall transmit one [1] such certified statement to the person having the highest number of votes for senator or representative, and shall transmit one [1] certified statement to the presiding officer of the house in which the successful candidate is to be seated, directed to the care of the secretary of state, by whom the same shall be delivered to the said presiding officer on the first day of the next session of the general assembly. The said certified statement shall be referred by such presiding officer for such action as that body may find appropriate: Provided, however, That when two [2] or more counties compose a district to elect a senator or representative, the clerks of such counties shall meet on Wednesday next following the day such recount is completed between the hours of one [1] and six [6] of the afternoon, at the courthouse of the oldest county in such district, where they shall compare the recount certificates filed with them and shall jointly make out and certify two [2] statements showing the total number of votes each candidate received and shall transmit the same as provided herein.

The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted as herein provided for the purpose of referring the information therein contained to the appropriate authorities. [Acts 1945, ch. 208, § 337, p. 680; 1961, ch. 313, § 4, p. 861.]

29-5415. Recount in respect to office for which votes were cast in all voting precincts of state—Duty of clerk to certify recount vote to secretary of state—Duty of secretary of state.—If a recount is had in respect to an office for which votes were cast in all voting precincts of the state, except governor and lieutenant-governor, or in more than one [1] county, except members of the general assembly, the clerk of the circuit court where such recount was had shall determine whether the votes as shown by such recount certificates differ from the votes in such precinct or precincts as the same had been returned to, and tabulated by the county canvassing board, and if he finds there is such difference he shall make his certificate showing the total vote in such county for such office for each candidate as corrected in accordance with the votes shown by such recount certificate and shall forthwith transmit the same to the secretary of state who then shall tabulate the vote for such office from such county in accordance with such certificate from such clerk; and if the secretary of state shall previously have included in his tabulations votes cast for such office as returned by such county canvassing board he shall correct such tabulation, in accordance with such certificate from such clerk and the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office. [Acts 1945, ch. 208, § 338, p. 680; 1961, ch. 313, § 5, p. 861.]

29-5416. Recount in respect to office voted upon in single county, city or smaller unit—Duty of clerk.—If the office in respect to which such recount is had was voted upon only in a single county, except members of the general assembly, city, or smaller unit, then the clerk of the circuit court shall determine whether the total tabulation of all votes for such office as made by the county canvassing board authorized to make such total tabulation is affected by the results of such re-

count as shown by such recount certificate, and if it is, then such clerk shall make his certificate showing the correct total vote for such office in accordance with such recount certificate and shall transmit such certificate to the county election board or such other officer as may be authorized by this act [chs. 28-60 of this title] to issue a certificate of election or commission for such office; and the candidate shown by such certificate of the clerk to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office, notwithstanding one may have been issued upon a previous return or certificate of the total votes cast for such office. [Acts 1945, ch. 208, § 339, p. 680; 1961, ch. 313, § 6, p. 861.]

29-5417. Payment of costs of recount—Time.—In those cases in which no cash deposit is made as provided in section three hundred and thirty-one [§ 29-5408], the petitioner or petitioners shall pay all of the costs occasioned by the recount to the clerk of the circuit court within ten [10] days after the recount has been finally completed: Provided, however, That in the event a cross-petition or cross-petitions are filed then the party or parties filing such cross-petition or cross-petitions shall pay to the clerk of the circuit court of the county in which such recount is had within ten [10] days after the recount is completed all of the costs occasioned by the recount of votes in the precinct or precincts which have been designated in his or their respective cross-petition or cross-petitions and the petitioner or petitioners shall be relieved of these costs of the recount. [Acts 1945, ch. 208, § 340, p. 680.]

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. 1232

RICHARD L. ROUDEBUSH,

Appellant,

v.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

No. 1236

THEODORE L. SENDAK
ATTORNEY GENERAL OF INDIANA,

Appellant,

v.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND RICHARD L. ROUDEBUSH,

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

BRIEF FOR APPELLEE HARTKE

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional and statutory provisions set out in the appellants' briefs, an additional provision of the Indiana Constitution, Article 4, Section 10, and certain additional provisions of the Indiana Election Code are pertinent to the court's consideration of the issues herein. The text of such provisions is set forth in the Appendix, *infra*, pages A-1 to A-18.

Three appendices have been filed with this court. The proceedings in the district court are set forth in a separately bound Appendix, which shall hereinafter be cited as "A. [page no.]". Article 27 of the Indiana Election Code, containing the statutory provisions governing a recount, are set forth in an appendix to the Brief for Appellant Roudebush, which shall hereinafter be cited as "Roudebush Appendix A-[page no.]". Other pertinent provisions of the Indiana Election Code are set forth in the Appendix to this Brief, and shall hereinafter be cited as "Hartke Appendix A-[page no.]".

QUESTIONS PRESENTED

1. Whether the invocation of the Senate's exclusive constitutional jurisdiction to determine appellee Hartke's right to membership in that body has rendered the issues presented by these appeals moot.

2. Whether a recount proceeding under the Indiana Election Code is a "proceeding in a State court" to which the anti-injunction statute, 28 U.S.C. §2283, applies.

3. Whether Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of votes in a United States senatorial election, conflicts with the provisions of Article 1, Section 5, of the Constitution of

the United States, which provides that the Senate shall be the judge of the elections, returns and qualifications of its members.

SUMMARY OF ARGUMENT

The exclusive jurisdiction of the United States Senate to determine appellee Hartke's right to membership in that body attached when Hartke presented his certificate of election and claimed his seat. Any matters touching upon conflicting claims to that seat are exclusively for the Senate to determine, and the issues presented by this appeal are therefore moot.

The conduct of a recount under Article 27 of the Indiana Election Code, is a non-adversary, non-reviewable, administrative proceeding. Such a proceeding, though carried out by a commission appointed by a state trial court, is not a "proceeding in a state court" within the meaning of 28 U.S.C. §2283, and that statute did not prohibit the issuance of a preliminary injunction by the district court.

Since the Indiana recount statute had been three times found to interfere with the constitutional prerogative of the Indiana legislature to judge the election and returns of its members, the district court had no occasion to abstain in deciding the federal constitutional question. The settled interpretation of the character and effect of recount proceedings by the Indiana Supreme Court, and the facts before it, compelled the district court's conclusion that such proceedings encroach upon the constitutional obligation of the Senate under Article 1, Section 5. In consideration of plaintiff's prayer for both declaratory and injunctive relief, the district court was obligated to resolve the constitutional question entirely apart from those facts which justified the granting of injunctive relief.

ARGUMENT

I. The jurisdiction of the Senate to determine the right of appellee Hartke to membership in that body having been invoked, any determination by this court would be wholly nugatory, and the controversy is therefore moot.

The explicit basis upon which appellant Roudebush filed his petitions for recount in eleven Indiana counties was that "petitioner desires to contest said election in respect of said office [of United States Senator]." A. 10. Such language is specifically required under the recount statute. Burns Ind. Stat., §29-5405; Roudebush Appendix A-4. The basic issue was then—and is now—whether appellee Hartke or appellant Roudebush is entitled to the office of United States Senator from Indiana.

Article I, Section 5 of the United States Constitution invests the United States Senate with the exclusive authority and obligation to determine that entitlement to office, and full power to do all things necessary to the performance of that duty. That principle is universally recognized and not disputed by any of the parties. See *Laxalt v. Cannon*, 80 Nev. 588, 590, 397 P.2d 466, 467 (1964).

On November 23, 1970, the Indiana Secretary of State certified to the Governor the results of the voting for the office of United States Senator. Plaintiff's Exhibit 1; A. 82, 85. On December 3, 1970, the Governor issued to appellee Hartke a certificate of election based upon such certified results. Plaintiff's Exhibit 2, A. 82, 85. On January 21, 1971, appellee Hartke presented himself to the Senate, claiming membership therein, and was duly sworn and seated. 119 Cong. Rec. (daily ed., Jan. 21, 1971) S 4.

In *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867 (1929), William S. Vare was elected to the United States Senate from Pennsylvania, but was not permitted to take the oath of office pending the Senate's investigation into allegations of fraud and corrupt practices in connection with his nomination and election. It was argued that the Senate had no power to investigate because Vare had not been seated, and was therefore not a "member" whose election, qualifications, and returns were subject to scrutiny under Article I, Section 5. In answering this argument, the court said:

> It is enough to say of this that upon the face of the returns he had been elected, and had received a certificate from the Governor of the state to that effect. Upon these returns and with this certificate, he presented himself to the Senate, claiming all the rights of membership. Thereby the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right immediately attached by virtue of section 5 of article 1 of the Constitution.
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> 279 U.S. 614, 49 S.Ct. 455, 73 L.Ed. 872

The jurisdiction of the Senate to determine and adjudicate the right of appellee Hartke to his seat in that body has been invoked. Whatever may have been Roudebush's rights at an earlier moment, no pronouncement by this court can now divest that tribunal of its exclusive juris-

diction; nor can any such pronouncement presently invest the state recount proceedings with any meaning or effect.[1]

This Court has recently had occasion to review and reconsider the Constitutional limitations upon the jurisdiction of the federal courts to "cases" and "controversies". *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Apropos to the present case is the following observation of Chief Justice Warren:

> Embodied in the words "cases and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to other branches of government.

392 U.S. 94-95, 88 S.Ct. 1949-50, 20 L.Ed.2d 958-59.

This case, in its present posture, is not capable of resolution through the force of any determination by this court. Moreover any such determination would intrude into

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1. Roudebush filed recount petitions in eleven counties of the state. (Brief for Appellant Roudebush, p. 4, note 1) Under the recount statute, Hartke was entitled to file cross-petitions seeking recounts in other precincts of those counties, and in all the precincts of other counties. (Burns Ind. Stat., 29-5403, Roudebush Appendix, A-2 to A-4). Believing that the Senate was the exclusive forum for such matters, Hartke chose not to file cross-petitions. The inconclusiveness and futility of further consideration by this court as to whether any recounts shall or shall not be permitted is evident: if and when the Senate is asked to consider the claims of Roudebush to the seat in question, Hartke may properly ask it to consider the correctness of returns in precincts other than those comprehended by Roudebush's petitions, and to "re-recount" votes counted under the state procedure.

an area constitutionally committed to another branch of government.[2]

Nor is the fact of mootness avoided by the argument of the Attorney General that "[t]he State of Indiana requires a final decision as to the constitutionality of its recount statute for the guidance of public officials in future elections." Brief for Appellant Sendak, p. 4. No public official has any right in any event to institute or prosecute recount proceedings under the state election code. That right is reserved to candidates alone. Burns Ind. Stat. 29-5401; Roudebush Appendix, A-2. While it might be a matter of some interest on the part of the Attorney General as to whether the statute is or is not unconstitutional, no right or privilege inherent to his office or the performance of his duties will be affected one way or another by such a determination.[3] There is truly no case

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2. That the oath was administered to Senator Hartke, by unanimous consent of the Senate, "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order." (117 Cong. Rec. S 4 (daily ed. Jan. 21, 1971)), does not save the case from mootness. Every senator is seated "without prejudice" in the sense that *the Senate* may at any time inquire into the merits of his title to the office. *Corbin v. Butler*, Report of Committee on Privileges and Elections, "Compilation of Senate Election Cases 1789-1885", S. Misc. Doc. No. 6, 52d Cong., 2d Sess., 547-48 (1893). But that right of inquiry is exclusively in the Senate, and nowhere else.

3. For the same reason, the order of the district court, granting the Attorney General leave to intervene, is of doubtful propriety. While 28 U.S.C. §2284(2) required the giving of notice of the hearing on the plaintiff's application for a preliminary injunction to the governor and attorney general, that statute did not grant them the right to intervene, nor does Rule 24, F.R. Civ. Proc. Rule 24(b) permits intervention by the state "officer or agency" which administers the particular statute or order in question. Here the Attorney

or controversy existing between appellant Hartke and appellee Sendak.

Further consideration of these appeals by this court would be "both officious and nugatory". *State ex rel. 25 Voters v. Selvig*, 170 Minn. 406, 212 N.W. 604 (1927). They should be dismissed for mootness.

II. A recount conducted under the provisions of the Indiana Election Code does not constitute "proceedings in a State court" within the meaning of Title 28, United States Code, Section 2283; accordingly, that section did not bar the three-judge district court's injunction against the recount commissioners and the appellant Roudebush.

The three-judge district court, after hearing, issued a preliminary injunction against Walker, Hammond and Butler (the three members of the recount commission) and appellant Roudebush, restraining and enjoining them from "taking any action whatsoever [under the provisions of the Indiana Election Code] . . . to conduct a recount for the office of United States Senator for the State of Indiana, in Marion County, Indiana, or elsewhere . . ." A. 51 The principal argument advanced by both appellants before this Court is that the "anti-injunction" statute, 28 U.S.C. 2283, stands as an absolute bar against the issuance of that injunction.

Title 28, United States Code, Section 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except

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General has nothing whatever to do with the recount procedure. See *McCrimmon v. Daley*, 418 F.2d 366, 368 (7th Cir. 1969); *Rodriguez v. San Antonio Independent School District*, 299 F.Supp. 476, 478 (W.D. Texas, 1969).

> as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[4]

The focus of the anti-injunction statute has been—and is—to preserve and reinforce the notion of comity between federal and state courts. *Younger v. Harris,* —— U.S. ——, 91 S.Ct. 746, 750, 27 L.Ed.2d 669, 675 (1970). In conformity with that intention, the proscription against use of the federal injunctive power applies to "proceedings in a State court", and not to administrative, legislative or executive proceedings. The historical discussion in *Toucey v. New York Life Ins. Co.,* 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941) leaves little doubt that the object of §2283 is to prevent interference with actual "litigation in the state court." 314 U.S. 132, 62 S.Ct. 143, 86 L.Ed. 104. Without doubt, the statute reaches all phases of a lawsuit from its inception to his final process, and so reaches even the possible interferences with execution and post-judgment procedures, but all of these assume that there has been a judgment in the first place. Administrative officers of a court can be regarded as exercising a judicial function and as part of a "proceedings" for

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4. The immediate predecessor of 28 U.S.C. 2283, Rev. Stat. 720, provided in pertinent part that:

> the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

An even earlier version of the same proscription against a writ of injunction "to stay any proceedings in state court" dates back to 1793. 1 Stat. 335 Ch. 22. The evolution of the anti-injunction statute is summarized in the dissenting opinion of Mr. Justice Douglas in *Younger v. Harris,* — U.S. —, 91 S.Ct. 746 at 762, footnote 3 (1971).

purposes of §2283 only when they are in the flow of an adjudicatory procedure. See e.g. *Mills v. Provident Life & Trust Co.*, 100 F.344 (9th Cir. 1900), holding that a sale on execution is a "proceedings" by the court, "culminating in a hearing and confirmation of the sale by the court." 100 F. 347. On the other hand, as the authorities, hereinafter cited plainly indicate, administrative, non-adjudicatory, non-adversary proceedings are not "proceedings in a state court" subject to Section 2283.

The Indiana recount procedure is of the latter character. The statutory procedure under which the appellant Roudebush purported to act is set out in Chapter 27 of the Indiana Election Code, Burns Ind. Stat. §§29-5401 through 29-5417. Roudebush Appendix, A-2 through A-11. Under the statutory scheme, a candidate desiring a recount initiates the procedure by filing "a verified petition" in a trial court of general jurisdiction for each of the counties containing a voting precinct or precincts in which a recount is sought. Burns Ind. Stat. 29-5403; Roudebush Appendix A-2. The candidate "who, on the face of the election returns is elected" has the right to file cross-petitions for recount in precincts or (in the case of state-wide offices) in counties other than those designated in the original petitions, Burns Ind. Stat. 29-5403; Roudebush Appendix, A-2. Each petitioner is also required to provide a minimum bond of $100 insuring the payment of the costs of the recount. The required bond is increased by $10 for each precinct in excess of ten designated in the recount petition. Burns Ind. Stat. 29-5408; Roudebush Appendix, A-5.

Twenty-five days after the election, the court in each county in which a recount petition has been filed appoints a three-man recount commission, to make a recount of the

votes in the precincts specified in the petition and cross-petition, if any. Burns Ind. Stat. 29-5409; Roudebush Appendix, A-6. Two of the recount commissioners are required to be members of opposite political parties. The third is required to be "a competent mechanic . . . familiar with voting machines". Burns Ind. Stat. 29-5410; Roudebush Appendix, A-7.

A court in which a recount petition is filed is required to impound the voting paraphernalia from the precincts to be recounted and to make it available to the recount commission. Burns Ind. Stat. 29-5413; Roudebush Appendix, A-7. On a day fixed by the court, the recount commission convenes to "commence" and "expeditiously complete" the recount.[5] Candidates, their watchers, and members of the press are entitled to observe the recount proceedings. Burns Ind. Stat. 29-5411; Roudebush Appendix, A-7.

Upon completion of the recount, the recount commission files with the clerk of the circuit court "its certificate showing the total number of votes received" in the recounted precincts by each candidate, including a statement as to which candidate "received the highest number of votes . . . and by what plurality. . . ." Insofar as a recount

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5. The statute gives the recount commission no further guidance or instructions in the performance of their duties. As the undisputed evidence before the district court shows, the practice in Indiana in conducting recounts has been that the recount commission does not confine itself to a mathematical verification of the votes counted and returned by the precinct election boards in the contested precincts. Rather, the commission substitutes its judgments for that of the precinct election boards and may determine, under some circumstances by a 2-1 partisan vote, not to count votes counted and returned by the precinct board, or to count votes not counted by the precinct board. See further discussion under Part IV of this Brief, *infra*, p. 21.

for the office of United States Senator is concerned, the certificate of a recount commission "supersede[s] for all purposes all previous returns". Burns Ind. Stat. 29-5414; Roudebush Appendix, A-8.

If the clerk of the circuit court, upon review of the recount commission's certificate, finds that its count differs from that tabulated by the county canvassing board, he is required to make and transmit to the secretary of state a new certificate, reflecting the vote as found by the recount commission in his county. The secretary of state corrects the total state-wide vote tabulation to reflect the changes reported in the certificates received from counties in which recounts were conducted. He then issues a new commission or certificate of election to the candidate shown by the corrected tabulation to have received the highest number of votes. Burns Ind. Stat. 29-5414; Roudebush Appendix, A-8.

No provision of the Indiana Election Code, nor any other provision of state law, provides for direct appellate review of the determination of a recount commission with respect to an election for the office of United States Senator.

As the foregoing summary indicates, the role of the court in the recount proceedings is simply to appoint the recount commission. The court finds no facts and enters no judgment, nor does any direct judicial review lie from the recount commission's determination. Although each affected candidate is entitled to be present himself and to have a "watcher" present, the recount proceedings are not adversary in character, and the candidates have no right to participate in them. The commission—and not the court or the candidates—conducts the recount. Indiana courts (and both appellants) recognize the ministerial—rather than judicial—character of recount proceedings. See

State ex rel. McCormick v. Superior Court of Knox County, 229 Ind. 118, 95 N.E.2d 829 (1951); *State ex rel. Watson v. Pigg*, 221 Ind. 23, 46 N.E.2d 232 (1943); Brief for Appellant Roudebush, pp. 32-33; Brief for Appellant Sendak, p. 22.

Where the function of the court is not judicial, as thus determined, the anti-injunction statute has no application to it at all. In *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908), a bill in equity was brought to enjoin the members and clerk of the Virginia State Corporation Commission—a body expressly assumed by Justice Holmes to be a "court"—from publishing or taking any other steps to enforce a certain order fixing passenger rates. It was argued that Revised Statutes §720 (the predecessor of 28 U.S.C. §2283) barred an injunction. In rejecting this argument, Mr. Justice Holmes observed:

> The State Corporation Commission is established and its powers are defined at length by the Constitution of the state. There is no need to rehearse the provisions that give it dignity and importance, or that add judicial to its other functions, because we shall assume that, for some purposes, it is a court within the meaning of Rev. Stat. §720, and in the commonly accepted sense of that word.
>
> • • • • •
>
> But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place within a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by §720.
>
> • • • • •
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> Proceedings legislative in nature are not proceedings in a court, within the meaning of Rev. Stat. §720, no matter what may be the general or dominant character

> of the body in which they may take place. [citations omitted] That question depends not upon the character of the body, but upon the character of the proceedings. Ex parte Virginia, 100 U.S. 339, 348, 25 L.Ed. 676, 680. * * *
> 211 U.S. 224-226, 29 S.Ct. 69, 53 L.Ed. 158-159.

A similar result was reached in *Central Electric & Gas Co. v. City of Stromberg, Neb.*, 192 F.Supp. 280 (D. Neb. 1960), aff'd 289 F.2d 217 (8th Cir. 1961). A provision of Nebraska law provided for submitting to voters the question of exercising the power of eminent domain to acquire certain privately owned public utilities. The statute provided for the certification of an affirmative vote in such an election to the state supreme court. Upon such certification the supreme court was required to appoint three state district judges from three judicial districts as a court of condemnation, and to prescribe the procedure to be followed by such court in formulating a record in the condemnation proceeding and making an appraisal of the property taken. The statute made their finding of value and the condemnation award appealable to the district court of the state and to the state supreme court.

An action was brought in the federal district court to enjoin any further proceedings before a court of condemnation already designated by the state supreme court. In response to the argument that 28 U.S.C. §2283 barred the granting of an injunction, the court said:

> . . . the quoted section of the United States Code is simply inapplicable. The action of the Supreme Court of Nebraska in erecting the Court of Condemnation was not a judicial but rather a ministerial act. The Court of Condemnation is not itself a court; and this is no less true though its members are by law required to be selected from among the judges of the state's

> courts of record of general jurisdiction. It is simply a board of appraisers, whose membership, by statutory mandate, is necessarily recruited from the personnel of the state's judiciary. Moreover, the proceeding pending before it is not—at least not yet—a civil action. Such is the settled view of the Supreme Court of Nebraska. [citations omitted]
>
> 192 F.Supp. 295.

The case presenting perhaps the most direct analogy to the case at bar is *Weil v. Calhoun*, 25 F. 865 (Cir. Ct. N.D. Ga. 1885). A special Georgia statute gave the ordinary of a county, in addition to his duties as a probate judge, the duty of counting the vote, examining the returns, and declaring the results of a county election on a local option law. An action was brought in the federal court to enjoin the ordinary from performing his duties under this statute. In disposing of the contention that Rev. Stat. §720 barred the relief sought, the court stated:

> It is said that under section 720 of the Revised Statutes this court cannot grant the prayer of this bill because the ordinary is a state court, and that section prohibits any federal court from enjoining a court of any of the states, under any circumstances. I do not think that the ordinary, in the performance of the duties provided by this act of 1885 of the Georgia legislature, is a court, in the sense of that section. The universal practice of the states is to have some branch of the executive department to determine the results of an election. Indeed, all officers performing such duties are part of the executive department, and yet in all the states the rule is imperative that the executive and judicial departments should be kept distinct.
>
> 25 F. 871.

The conduct of a recount under the Indiana Election Code, by a recount commission appointed by a court, is a non-judicial function in the same sense as was rate-making in *Prentis*, appraisal in *City of Stromberg*, and counting the vote in *Weil*. There is no federal bar to Indiana's determination to vest the recount function generally in a "court".[6] But that determination does not alter the administrative nature of the recount, nor does it clothe administrative actions therein with the immunity conferred upon the state judiciary by §2283. The recount proceedings are not "proceedings in a State Court" with respect to which an injunction is barred by 28 U.S.C. §2283.[7]

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6. Federal courts, when given non-judicial functions to perform, have sometimes tended to be reluctant or have outright declined to perform them. See Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436 (1792) The line of distinction was classicly recognized in United States v. Ferreira, 13 How. 40, 14 L.Ed. 42, 45 (1851), an opinion in which Chief Justice Taney declined to pass upon an award of war damages as determined by a district judge of the United States for Florida. The court found that the trial judge was proceeding simply as a commissioner, and declined to review the matter because a "proceeding before a commissioner" is not "a judicial one."

7. An apparent dilemma appears in arguing, on the one hand, that recount proceedings are administrative—and non-adjudicatory—in character for purposes of determining the applicability of 28 U.S.C. §2283; and, on the other (Points III and IV, *infra*) that such proceedings permit and require "judging" of the election and returns and thereby encroach upon Article 1, Section 5. The dilemma is only apparent. One can readily catalog a whole host of proceedings clearly administrative in character in which the administrative body makes choices among conflicting alternatives based upon its resolution of disputed facts. To say that a particular proceeding is "non-judicial" in no sense excludes the possibility that it may require "judging"—with profoundly significant consequences. See *United States v. Ferreira*, note 6, *supra*, 13 How. 48, 14 L.Ed. 45.

III. The district court properly exercised its jurisdiction to determine that a recount with respect to a United States Senatorial election would interfere with the Constitutional prerogative of the United States Senate to judge the elections and returns of its members.

Appellants have cited and discussed at length cases from Nevada, Oklahoma, Minnesota, and Georgia[8] which state or imply that the "recount" proceedings provided by the statutes of those states, as applied to federal congressional elections, do not violate the provisions of Article I, Section 5 of the United States Constitution. In its majority opinion, the district court cited a considerably larger number of cases from other states in support of its conclusion that

> [t]he great weight of authority supports plaintiff's position that court proceedings for *recount or contest* with regard to an election for representative in the national House of Representatives or for United States Senator are unconstitutional, as in conflict with Article 1, Section 5 . . . [court's italics] A. 58-59.

Were the Indiana recount statute viewed only in the light of this apparent split in authority, and in the absence of any judicial gloss by the Indiana Supreme Court, the district court justifiably might have declined to exercise its jurisdiction and abstained to await clarification by the Indiana courts. But there was no necessity for the district court to "postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of

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8. Laxalt v. Cannon, 80 Nev. 588, 397 P.2d 466 (1964)
Wickersham v. State Election Board, 357 P.2d 421 (Okla. 1960)
Odegard v. Olson, 265 Minn. 439, 119 N.W.2d 717 (1963)
Blackburn v. Hall, 115 Ga. App. 235, 154 S.E.2d 392 (1967)

[uncertain] state law." *Harman v. Forssenius,* 380 U.S. 528, 534-35, 85 S.Ct. 1177, 1181-82, 14 L.Ed. 2d 50, 55 (1965). The state statute here questioned was not fairly subject to an interpretation which might modify or render unneeessary the federal constitutional question; the district court was under a duty to exercise its properly invoked jurisdiction. *Baggett v. Bullitt,* 377 U.S. 360, 375-76, 84 S.Ct. 1316, 1324-25, 12 L.Ed.2d 377, 387-88 (1964).

That conclusion is compelled by an examination of the three Indiana cases cited and discussed by the district court. In each of these cases, the Indiana Supreme Court was called upon to determine whether recount proceedings with respect to elections to the state legislature were constitutionally permitted under the provisions of Article 4, Section 10 of the Indiana Constitution, which provides that

> Each House . . . shall . . . judge the elections, qualifications and returns of its members.

In *State ex rel. Acker v. Reeves,* 229 Ind 126, 95 N.E.2d 838 (1951), disappointed candidates for the Indiana House of Representatives from Vanderburgh County filed a petition for recount in the Vanderburgh Circuit Court. The candidates prevailing on the face of the initially reported canvass sought a writ of prohibition from the Indiana Supreme Court. The court found the recount statute void and granted the writ upon the ground that the Indiana Constitution gave express and exclusive power to the general assembly to judge the elections and returns of its members. 229 Ind, 129-30, 95 N.E.2d 840.

In *State ex rel. Beaman v. Pike Circuit Court,* 229 Ind. 190, 96 N.E.2d 671 (1951), petitions were filed in two

counties to obtain recounts in an election for the office of joint state senator. A recount commission was appointed in each county. Again the Indiana Supreme Court prohibited the recounts. Noting that the recount statute was "void ab initio" insofar as it applied to members of the Indiana General Assembly, the court held that even if the conduct of a recount was merely ministerial in character, the unconstitutional statute conferred no jurisdiction whatsoever—whether for judicial *or* ministerial acts. 229 Ind. 193-94, 96 N.E.2d 672.

The court also rejected the argument made here by both appellants that "[b]asically, the recount proceeding is a means of discovery . . ." Brief for Appellant Roudebush, p. 32; Brief for Appellant Sendak, p. 22. The court noted that under the provisions of Burns Ind. Stat. 29-5414, the recount certificate superseded for all purposes all previous returns, and that under Burns Ind. Stat. 29-5415 "the candidate shown by such corrected tabulation to receive the highest number of votes . . . shall be entitled to a certificate of election . . . notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office." The court concluded that such provisions constituted or so nearly approached an adjudication of the elections and returns of members of the legislature "that it may interfere with the constitutional right of the Legislature to judge the elections and returns of its members. . . . [I]ts effect is more than a mere procedure for the discovery of evidence." 229 Ind. 196, 96 N.E.2d 673.

Following these decisions, the Indiana legislature in 1961 attempted to bring the Indiana law in conformity with the Indiana Constitution. It did so by excepting the offices of governor, lieutenant-governor, and members of the

general assembly from the proviso that the certificate of a recount commission would supersede for all purposes all previous returns; and providing for reference of a certified statement of the results of the recount to the general assembly "for such action as that body may find appropriate." Burns Ind. Stat. 29-5414; Roudebush Appendix, A-9. No changes were made in the recount statute insofar as it purported to be applicable to a United States Senatorial election.[9]

However, even this effort to legitimize recounts in legislative elections was found wanting. In *State ex rel. Batchelet v. DeKalb Circuit Court,* 248 Ind. 481, 229 N.E.2d 798 (1967), an unsuccessful state senatorial candidate filed a recount petition in the DeKalb Circuit Court. The senator-elect obtained a temporary writ of prohibition against the recount from the Indiana Supreme Court. While the matter was pending, the Indiana Senate convened and resolved the dispute. When the Indiana Supreme Court thereafter considered the matter, it made the writ of prohibition permanent, rather than dismissing the proceeding as moot, and quoted with approval from *Acker:*

> [The] right of legislative bodies to judge the election, qualifications, and returns of their own members is of ancient origin. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread. 248 Ind. 482, 229 N.E.2d 798-99.

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9. The argument of appellant Sendak that the 1961 amendment "explicitly limited the office of the recount to that of an informative function and nothing more", (Brief for Appellant Sendak, p. 21) is simply fallacious to the extent that it purports to relate to a United States senatorial or congressional election.

The scope and effect of the Indiana recount statute has thus been definitively stated by the courts of Indiana. Plaintiff's amended complaint sought both declaratory and injunctive relief against the unconstitutional application of that statute to a United States senatorial election. A. 39 Even if circumstances justifying the granting of injunctive relief had not been established by the evidence, the district court was bound to make the constitutional determination sought by Hartke in the court below. *Zwickler v. Koota,* 389 U.S. 241, 254, 88 S.Ct. 391, 399, 19 L.Ed.2d 444, 454 (1967).

On that question, the district court was confronted with the binding determination that, as a matter of law, recount proceedings for state legislative offices interfere with the constitutional authority of the general assembly to judge the elections and returns of its members as provided in Article 4, Section 10 of the Indiana Constitution. The identical language of Article 1, Section 5 of the United States Constitution compelled the district court to conclude that the same recount proceedings in respect to a United States senatorial election would interfere with the constitutional prerogative of the United States Senate to judge the elections and returns of its members and thereby encroach upon Article 1, Section 5.

IV. The facts, as well as the law, support the district court's determination that the conduct of a recount in the United States Senatorial election would interfere with the constitutional prerogatives of the Senate and irreparably damage appellee Hartke.

The determination of the district court that a recount would interfere with the ability of the Senate to perform its constitutionally imposed duties, and irreparably

damage appellee Hartke,[10] was supported not only by the clear pronouncements of the Indiana Supreme Court, but also by the uncontradicted evidence before it outlining, in practical terms, how a recount in Indiana is conducted. That evidence must be considered in light of the procedure by which the vote is initially counted, reported, and certified. (The pertinent statutory provisions are set out in Hartke Appendix, A-1 to A-18).

Each voting precinct is under the direction of a precinct election board, consisting of an inspector and two judges. Burns Ind. Stat. 29-3201; A. 91. After the polls close, the voting machines are opened and the votes registered on such machines are recorded on tally sheets. Burns Ind. Stat. 29-5110; Plaintiff's Exhibit 8-C; A. 92, 96. After the machine vote has been tallied, the machines are sealed by the precinct inspector. Burns Ind. Stat. 29-5111; 29-5206; A. 93-94, 99. The paper ballots, which include all absentee ballots, are removed from the ballot box, and opened.[11] Burns Ind. Stat. 29-4914. The paper ballots are

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10. Appellants asserted in the district court, and now argue, that the absence of an allegation of irreparable injury in plaintiff's complaint in the district court was fatal to the invocation of the court's equity jurisdiction. Appellant Roudebush wholly neglects to mention that plaintiff's original complaint was accompanied by a Verified Application for Temporary Restraining Order, which set forth at length the injury which Hartke would suffer if a recount were permitted to proceed. A. 27. The evidence presented by the plaintiff at the hearing on the temporary injunction was in large part specifically directed to that issue, and the court made specific findings thereon. Under such circumstances, the provisions of Rule 15(b), F. R. Civ. Proc., clearly overcome any pleading deficiency.

11. Although Indiana law authorizes and directs the county commissioners of every county in the state to procure voting machines for use in the various precincts of the county (Burns Ind. Stat. 29-5803), there were several counties in

then counted and tallied; any ballot bearing a distinguishing mark, or any mutilated ballot, or any ballot from which it is impossible to determine the elector's choice of candidates is not counted. The counted ballots are placed in one paper bag and sealed. Plaintiff's Exhibit 8-A; A. 95-96. The uncounted and defective ballots are placed in another bag and sealed. Plaintiff's Exhibit 8-B; A 95-96; Burns Ind. Stat. 29-5201. When the vote tally from both the machines and paper ballots is completed, a Certificate of Memoranda is prepared and certified by the precinct election board, summarizing the total vote tally. Plaintiff's Exhibit 8-D; A. 95-96. A copy of the tally sheet attested by the election board clerks, and the Certificate of Memoranda, are sealed in an envelope. Burns Ind. Stat. 29-5202; A. 97. The sealed envelopes and bags containing the ballots, counted and not counted, unused ballots, and tally sheet and Certificate of Memoranda are delivered by the precinct election board inspector to the county canvassing board. Burns Ind. Stat. 29-3212; 29-5216; A. 97.

The county canvassing board, utilizing only the tally sheet and Certificate of Memoranda from each precinct, tabulates the county vote. A. 98, 99-100. The county canvassing board may verify the machine vote in any precinct by inspection of the machine counters. Burns Ind. Stat. 29-5219. The paper ballots are required to be preserved by the clerk of the court in their sealed state for at least six months. Burns Ind. Stat. 29-5204. They are

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the state, including at least one in which appellant Roudebush filed a petition for recount (Wayne County) in which all the voting in the 1970 general election was done by paper ballots. A. 143. In precincts with voting machines, only absentee votes are cast by paper ballot.

not examined or inspected by the canvassing board. Burns Ind. Stat. 29-3212; A. 98.

When the county canvassing board completes its tabulation, the clerk of the circuit court (a member of the canvassing board) forwards to the secretary of state a certified statement reflecting the number of votes for each candidate for statewide office. Burns Ind. Stat. 29-5306. The election code provides for a ten-day period following this certification during which any error in such certification may be corrected.[12] Burns Ind. Stat. 29-5307.

Upon the expiration of the ten-day period for correction of errors, the secretary of state certifies to the governor the person having the highest number of votes as duly elected. The governor is thereupon required to give such person a certificate of election. Burns Ind. Stat. 29-5309. The certification by the Secretary of State to the governor of the election of appellee Hartke was made on November 16, 1970, and a certificate of election was thereupon issued to Hartke on December 3, 1970. A. 53-54.

The evidence before the district court, and its judicial knowledge of custom, practice and usage in Indiana (A. 60-61), indicate that in the conduct of a recount, it is the practice of recount commissions to open the respective bags in which the paper ballots counted and not counted had been sealed by the precinct election boards in the precincts subject to recount, and to make entirely new determinations as to whether a particular ballot should,

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12. At least two corrections were made in the county votes for the office of United States Senator certified to the secretary of state following the November 1970 general election, pusuant to this provision, including a correction in the Marion County vote. Plaintiff's Exhibit 1, A. 82, 85; Plaintiff's Exhibit 7, A. 84, 85, 130.

or should not be, counted. Ballots initially counted by a precinct election board may be rejected by a recount commission, and ballots rejected by the precinct election board may be deemed valid and counted. A. 104-106. In the event of a dispute among the members of a recount commission as to the validity of any particular ballot, that issue is determined by a majority vote of the commission. A. 110-111. The ballots themselves are sorted into different envelopes than those from which they were taken, on the basis of these new determinations by the recount commission. A. 107.

The district court found upon the evidence that there was no way in which a recount commission could "make a simple mathematical verification of the vote". A. 61. It concluded that the judgments which must constantly be made by a recount commission in order to determine which ballots to count and which ballots not to count transgressed the right of appellee Hartke "to have the returns of the November 3 election judged by the Senate and not piecemeal by various commissions appointed by various state courts." A. 58.

The district court also found upon the evidence that a recount would not only encroach upon the constitutional duty of the Senate under Article I, Section 5, but that to permit recounts to go forward would impair the ability of the Senate to perform its constitutional obligation. A. 67. The recount petition filed by Roudebush in Marion County averred that "through mistake or fraud" the votes were not correctly counted. A. 10. The range of conduct which those averments might encompass is almost infinite. Whatever their intended scope, it is the Senate which must judge whether and to what extent any such mistake or fraud existed, and the effect upon appellee Hartke's right to a seat in that body.

> It is clear that any kind of fraud in procuring an election . . . would properly be material to an inquiry for information in connection with the power of the Senate to judge the elections, returns and qualifications of its own members. *Seymour v. United States*, 77 F.2d 577, 584 (8th Cir. 1935)

It is essential to the performance of that judicial function that the evidence upon which that determination must be based, which indisputably includes the ballots, tally sheets and other election paraphernalia, should be preserved unimpaired.[13]

Moreover, notwithstanding any power which a court might have "to provide for the protection of all ballots and voting machines" (Burns Ind. Stat. 29-5413; Roudebush Appendix, A-7), the district court's observation concerning "piecemeal" judging points to another reason for legitimate concern with respect to the integrity of the election paraphernalia. The ballots and other paraphernalia in precincts subject to recount would be handled not by a single recount commission, but by 33 individuals, comprising 11 different recount commissions. Each commission is likely to have varying views as to the procedure to be adopted by it, and as to the standards governing its determination of the validity or non-validity of ballots. Each of the eleven courts which appoints a recount commission is likely to have a different view of its authority and responsibility protecting the ballots. The potential hazard of destruction or mutilation of ballots or of evidence of fraud reflected in the physical condition of the ballots or their containers is multiplied eleven-fold. And when the margin of victory is 4,383 votes out of a total

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13. The evidentiary nature of the ballots in contest proceeding is explicitly recognized by the Election Code. Burns Ind. Stat. 29-3212; Hartke Appendix, A-3, 4.

of 1,737,797, the effect of even a minor misadventure in the handling of the election material upon the ability of the Senate, as the exclusive arbiter, to determine disputed factual issues is abundantly clear.

These considerations underlie the determination by a majority of the district court that appellee Hartke would be irreparably harmed, and the Senate's constitutional prerogatives abridged. This court should not disturb those findings.

Conclusion:

The appeals should be dismissed for mootness, and Appellant Roudebush remitted to his remedies before the United States Senate. Alternatively, the order of the district court granting the preliminary injunction, and the judgment of the district court declaring the Indiana recount statute unconstitutional in its application to a United States senatorial election should be affirmed.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article 4, § 10 of the Indiana Constitution reads as follows:

§ 10. Officers — Procedure — Adjournment. — Each House when assembled, shall choose its own officers, the President of the Senate excepted; judge the elections, qualifications, and returns of its own members; determine its rules of proceeding, and sit upon its own adjournment. But neither House shall, without the consent of the other, adjourn for more than three days, nor to any place other than that in which it may be sitting.

The text of pertinent provisions of the Indiana Election Code (not reproduced in appellants' appendices) as they appear in Title 29, Burns Indiana Statutes, reads as follows:

29-3201. Precinct election boards — Members — Qualifications — Failure to serve — Filling vacancies — Primary election boards. — Except as hereinafter otherwise provided, the county election board shall appoint for each voting precinct in its county the precinct boards of election, each of which shall consist of one [1] inspector, and two [2] judges of opposite political faith who shall be qualified voters of the township in which they reside. Any member of any precinct election board who is not a resident of said precinct shall be entitled to vote by absent voters' ballot as provided in this act [chs. 28-60 of this title]. No person shall be eligible as a member of the board of election who has anything of value bet or wagered on the result of such election, or is a candidate to be voted

for at such election, or who is a husband, wife, father, mother, father-in-law, mother-in-law, son, daughter, son-in-law, daughter-in-law, grandfather, grandmother, grandson, granddaughter, brother, sister, brother-in-law, sister-in-law, uncle, aunt, nephew, niece, first or second cousin of any candidate at such election, or who is unable to read, write and speak the English language, and any such person so serving shall be guilty of a misdemeanor. If at any time before, or during an election it shall be made to appear to any inspector, by the affidavit of two [2] or more qualified electors of the precinct, that either of the judges is disqualified under the provisions of this article [§§29-3201—29-3216], he shall at once remove such judge and fill the place with a qualified person of the same political party as the judge removed; and, in case such disqualified judge shall have taken the oath of office prescribed, the inspector shall place such oath and affidavit before the next grand jury of the county.

If any member of an election board shall fail to appear at the hour appointed for the opening of the polls, the remainder of the board shall select a member of his political party to serve in his stead; Provided, That if the qualified electors of his party present at the polls shall nominate a qualified person for such vacancy, such nominee shall be appointed. If none of the members of an election board shall appear at the hour appointed for opening the polls, the qualified electors present shall elect a board viva voice, as nearly as possible in conformity with the provisions hereof; Provided, however, That precinct boards in a primary election shall consist of one [1] inspector, and two [2] judges of opposite political faith, each of whom shall be a qualified voter of the precinct in which they reside and serve. [Acts 1945, ch.

208, §25, p. 680; 1951, ch. 19, §1, p. 48; 1965, ch. 261, §3, p. 683.]

29-3212. **Filing of election returns.**—It shall be the duty of each inspector of elections, as soon as the certificates required by law to be signed by the precinct election boards have been signed, to deliver the same, with the poll list of voters and one [1] of the tally papers containing the vote of the precinct for all national, state, district and county officers voted for, and with the bags required by law to be returned by said inspector, to the clerk of the circuit court, at the office of such clerk or at the place of meeting of the board of canvassers, for the use of the board of canvassers, and said clerk shall be in attendance for such purpose. The board of county commissioners in each county shall provide said board of canvassers a proper receptacle or receptacles in which to place said sealed bags. Said receptacle shall be supplied with two [2] locks having different keys with which said receptacle can be securely locked. Upon their receipt, said sealed bags shall be placed in said receptacles and the same shall be securely locked, and one [1] of said keys shall be delivered to said county clerk and the other to the member of said board of canvassers opposite in politics to said clerk. The poll lists of voters and tally-sheets used by said board of canvassers in canvassing said vote shall be deposited in the office of such clerk and shall be open to public inspection. Said receptacles, when locked, shall likewise be lodged in such clerk's office. Said receptacles shall not be opened or their contents removed therefrom except upon the order of the circuit court of said county or the judge thereof in vacation. If, at the expiration of six [6] months from the date of such election, no proceeding is pending in which such ballots have been ordered held by any court for use as evi-

dence, said sealed bags shall be removed from said receptacles by the officials holding such keys and the same shall be destroyed. [Acts 1945, ch. 208, § 36, p. 680.]

29-4914. Handling of absent voter's ballot in precinct—Duties of election inspector—Procedure.—At any time between the opening and closing of the polls on such election day, the election inspector of such precinct, in the presence of the election board, shall open the outer or carrier envelope only, announce the absent voter's name and compare the signature upon the application with the signature upon the affidavit on the ballot envelope. In case the election inspector finds the affidavit properly executed and attested, that the signatures correspond, that the applicant is a duly qualified elector of the precinct, that he is duly registered, where registration is required, or that the applicant has not voted in person at such election, or, in case of a primary election, if he has not previously exercised the right of suffrage, if he shall have executed the proper declaration relative to his age and qualifications and the party with which he intends to affiliate, the election inspector shall open the envelope containing the absent voter's ballot in such manner as not to deface or destroy the affidavit thereon and take out the ballot or ballots inclosed therein without unfolding or permitting the same to be unfolded or examined. The inspector shall then deliver such ballot or ballots to the clerks, who shall at once proceed to write their initials, above the signature of the clerk of the circuit court or the secretary of state as the case may be, in ink on the lower lefthand corner on the back of each of such ballots in their ordinary handwriting and without any distinguishing mark of any kind and in the same manner as other ballots are required to be indorsed. The inspector shall thereupon deposit the same in the proper ballot-box or ballot-boxes

and enter the absent voter's name in the poll list, the same as if he had been present and voted in person. In the event that such affidavit is found to be insufficient, or that the signatures do not correspond, or that the applicant is not a duly qualified elector in such precinct or that he has voted in person at such election, or that he has not registered, if registration is necessary, or that the ballot is open, or has been opened and resealed, or that the ballot envelope contains more than one [1] ballot of any one kind, or in case of a primary election, and if such absent voter has not previously exercised the right of suffrage, if he shall have failed to execute the proper declaration relative to his age and qualifications and the party with which he intends to affiliate, each ballot or ballots shall not be accepted or counted. Every ballot not accepted or counted for any of the reasons hereinbefore enumerated shall, without unfolding the same to disclose how it is marked, be indorsed on the back thereof with the words: "Rejected ——— (giving the reason or reasons therefore)." All rejected absent voters' ballots shall be inclosed and securely sealed in an envelope on which the election inspector shall indorse the words: "Defective absent voters' ballot," with a statement of the precinct in which and the date of the election at which they were last signed by such inspector and returned to the same officer and in the same manner as by law provided for the return and preservation of official ballots cast and uncast at the election. [Acts 1945, ch. 208, §207, p. 680.]

29-5110. Announcing result—Record.—As soon as the polls of the election are closed, the inspector, in the presence of the judges and clerks, shall immediately lock the voting machine against voting and open the counting compartment, giving a full view of all the counter numbers to all members of the election board including clerks and

sheriffs. The inspector shall, in the order of the offices as their titles are arranged on the machine, read and announce in distinct tones the result as shown by the counter numbers. He shall also in the same manner announce the vote on each constitutional amendment, proposition or other question voted on. The vote so announced by the inspector shall be taken down by each of the clerks and recorded on books or papers prepared for that purpose. They shall record the number of votes received for each candidate on the regular ticket and also the number received by each person on the irregular ticket. The certificates of the number of votes cast for each person shall be made and signed as required in this act [chs. 28-60 of this title] in case of other election returns, and all statements of the number of votes required in this act in duplicate, triplicate or otherwise shall be made and signed by the election officers. And such certificates and other papers shall be returned to the office of the clerk of the circuit court in the same manner, under the same regulations and penalties as are prescribed in this act for election returns from precincts in which no voting machines are used. [Acts 1945, ch. 208, §279, p. 680.]

29-5111. **Locking machine.**—The inspector, as soon as the count is completed and fully ascertained, as required in section two hundred and seventy-nine [§29-5110] shall close and lock the machine against voting or being tampered with, and it shall so remain for a period of at least thirty [30] days except as provided in section three hundred and two [§29-5219]. When irregular ballots have been voted, the inspector shall return all of such ballots in a properly secured sealed package, indorsed "Irregular ballots," and indicating the precinct and county, and file such package with the clerk of the circuit court. It shall be preserved for six [6] months after such election and

may be opened and its contents examined only upon an order of a court of competent jurisdiction; at the end of such six [6] months, unless ordered otherwise by the court, such package and its contents may be destroyed. [Acts 1945, ch. 208, §280, p. 680.]

29-5201. Election boards—Canvass of vote in precinct—Disputed ballots—Procedure—Duty of election board.—The precinct election boards except as otherwise herein provided shall, in canvassing the votes, begin first with the state ballots and complete them before proceeding with the local ballots, by laying each ballot upon the table in the order in which it is taken from the ballot-box; and the inspector and the judge of election differing in politics from the inspector shall view the ballots as the names of the persons voted for are read therefrom. And in the canvass of the votes any member of the election board may protest as to the counting of any ballot, or any part thereof, and any ballot which is not indorsed with the initial of the clerks, as provided for in this act [chs. 28-60 of this title], and any ballot which shall bear any distinguishing mark or mutilation shall be void, and shall not be counted, and any ballot, or part of a ballot, from which it is impossible to determine the elector's choice of candidates, shall not be counted as to the candidate, or candidates, affected thereby; and all ballots, voted and not voted, together with all protested, disputed or uncounted ballots and certificates of the election board and tally sheets, shall be preserved by the inspector and at the close of the count placed in separate packages, together with the seals of the ballot packages, in paper bags securely sealed, and delivered to the clerk of the circuit court with notification of the number of ballots so placed in such bags, and of the condition of the seals of the ballot packages. The clerk shall also record on the

tally sheets memoranda of such ballots, and the condition of the seals of the ballot packages, and in any contest of election such ballots and seals may be submitted in evidence. And before said ballots are placed in the bag as aforesaid, one of the poll clerks shall indorse upon the back of each disputed or protested ballot the word "counted" or "not counted," as the case may be, and said indorsement shall be signed officially by both of said clerks. The election board shall immediately make a memorandum of the total vote cast for each candidate and deliver a copy thereof to each member of such board. [Acts 1945, ch. 208, §284, p. 680.]

29-5202. Certificate of precinct election board.—When the votes shall be counted, the election board shall make out a certificate, under their hands, designating the office and stating the number of votes each person has received, which number shall be written in words; and such certificate, together with one [1] of the list[s] of voters and one [1] of the tally papers, shall be deposited with the inspector, or with one [1] of the judges who shall be selected by the precinct election board. [Acts 1945, ch. 208, §285, p. 680.]

29-5203. Clerk's duties.—The clerk of the circuit court shall securely keep said envelope, containing certificates of the election board, tally paper and ballots, so sealed, with the ballots and papers therein in the same condition as it was received by him from the inspector, in his office unless opened by said inspector in the presence of the board of canvassers as herein provided, for the period of six [6] months. But when such election is contested, he shall preserve them so long as such contest is undetermined, subject to the order of the court trying such contest: Provided, That said inspector shall, after sealing said envelope containing such ballots and one [1] of the

tally papers, plainly mark said envelope upon the outside, in ink, with the name, number and township. [Acts 1945, ch. 208, §286, p. 680; 1949, ch. 25, §22, p. 43.]

29-5204. Disposition and care of ballots—Penalty.—As soon as the ballots cast in any primary or general election held in this state shall have been counted, they, together with all uncast ballots shall, in the presence of the judges and clerks, be carefully and securely placed by the inspector in a strong and stout paper envelope or bag, which shall then be tightly closed and well sealed with wax by the inspector, and shall be delivered by such inspector to the clerk of the circuit court of the county at the very earliest possible period before or on the Thursday next succeeding such election, and the inspector shall securely keep said envelope containing the ballots and papers therein and permit no one to open said envelope or touch or tamper with said ballots or papers therein. And upon the delivery of such envelope to the clerk, the inspector shall take and subscribe an oath, before said clerk, that he has securely kept said envelope and the ballots and papers therein, and that, after said envelope had been closed and sealed by him in the presence of the judges and clerks, he had not suffered or permitted any person to break the seal or open said envelope, or touch or tamper with said ballots or papers, and that no person has broken such seal or opened said envelope, to his knowledge; which oath shall be filed in said clerk's office with the other election papers. The clerk of the circuit court of the county shall preserve such ballots for at least six [6] months from the date of receiving them, during which time they shall be subject only to the demand of the judge of any circuit or Superior Court of this state, in connection with any litigation arising from the primary or general election at which they were cast, and at the end of six [6] months,

he shall destroy them. [Acts 1945, ch. 208, §287, p. 680; 1949, ch. 25, §23, p. 43.]

29-5206. Voting machines—Procedure.—In those counties employing voting machines at any primary or election, the vote, as registered on such machines, shall be taken and certified at the precinct polling-place upon the closing of the polls by the precinct election boards on forms to be supplied to such precincts. When such totals shall be so taken and certified, each such machine shall be sealed by the inspector in the presence of such precinct election board. Copies of such totals so taken and properly certified by all members of such boards shall then be delivered to each member of such board and the original and one [1] duplicate thereof shall promptly be delivered by the inspector to the clerk of the circuit court with any ballot boxes and all other precinct election papers of such precinct. The voting machines used in any such precinct after sealing, as aforesaid, shall remain at the precinct polling place until collected. [Acts 1945, ch. 208, §289, p. 680; 1949, ch. 25, §24, p. 43.]

29-5208. Board of canvassers—Times and places of assemblies.—In each county in the state the county election board shall constitute a county board of canvassers, who shall canvass and estimate the certificates, poll lists and tally papers returned by each inspector of elections in the county, for which purpose the board shall assemble in a room in the courthouse provided for it by the board of county commissioners, at six o'clock P.M., upon the day of each election: Provided, That in all counties of two hundred fifty thousand [250,000] inhabitants or more as shown by the last preceding United States census, wherein a general, state or county election or primary election is to be held, the board of county commissioners of such county shall upon the written request and order made upon

them by the judge of the circuit court of said county, at least ten [10] days before any such election, provide a suitable assembly room for such board of canvassers, other than the circuit courtroom of said county. [Acts 1945, Ch. 208, §291, p. 680; 1947, ch. 120, §32, p. 364; 1963, ch. 152, §1, p. 177.]

29-5209. Chairman — Clerk. — The members of the county canvassing board shall select one [1] of their numbers as chairman, and the clerk of the circuit court shall act as clerk of such board. [Acts 1945, ch. 208, §292, p. 680.]

29-5211. Board's duties.—Such county board of canvassers, when organized, shall carefully compare and examine the papers entrusted to it, and aggregate and tabulate from them the vote of the county, township, or the vote of the city, as the case may be, a statement of which shall be drawn up by the clerk, which shall contain the names of the persons voted for, the office, the number of votes given in each precinct, ward or township in a county election, and in each ward and precinct in a city election to each person; the number of votes given to each in the county or city and also the aggregate number of votes given, which statement shall be signed by each member of such board, and canvass sheets, together with such certificates, and tally papers, shall be delivered to the clerk, and by him filed in his office; and the same shall be preserved by him open to inspection of any legal voter. [Acts 1945, ch. 208, §294, p. 680.].

29-5212. Certificate.—Such county board of canvassers shall declare the persons having the highest number of votes given for any office to be filled by the voters of a single county, township, or municipal subdivision thereof duly elected to such office, and certify the same in the

statement above required. [Acts 1945, ch. 208, §295, p. 680.]

29-5214. Defective papers—Duty of board.—No tally papers, poll lists or certificates returned from any election board shall be rejected for want of form or for lack of being strictly in accordance with the directions contained in this act [chs. 28-60 of this title], if such certificates can be satisfactorily understood, and such board of canvassers shall in no case reject the returns from any precinct if the same be certified by the board of election of that precinct as required in this act, and returned by the inspector or one [1] of the judges of said board. [Acts 1945, ch. 208, §297, p. 680.]

29-5216. Election returns—Inspector and clerks.—It shall be the duty of each inspector of elections, as soon as the certificates required in this act [chs. 28-60 of this title] to be signed by the precinct election boards have been signed, to deliver the same, with one [1] of the tally papers containing the vote of the precinct for all state, district, county, city, and township officers voted for, and with the bags required in this act to be returned by said inspector to the clerk of the circuit court at the courthouse for the use of the board of canvassers except as otherwise herein provided, and that there may be no delay in the canvassing of the vote of any county, township, or city, it is declared to be the duty of the clerk to keep the clerk's office open all night upon the night of any election at which county, township, or city officers are voted for. [Acts 1945, ch. 208, §299, p. 680.]

29-5218. Rules for counting votes.—Rule 1. The whole ballot is void if the voter (a) does any act extrinsic to the ballot such as inclosing any paper or other article in the folded ballot or (b) makes any mark thereon other than

a cross X mark on or in a voting square or circle, or other than the writing in of a name for the purpose of voting; except that an erasure shall not make the ballot void, but shall render it blank as to the office, party position or question in connection with which it is made. In applying any provision of this section to a primary election, the term "voting square" shall include the voting space at the left of the name of a candidate on the primary ballot.

Rule 2. A cross X mark, made by a voter, on or in a voting square at the left of a candidate's name shall be counted as a vote for such candidate.

Rule 3. A cross X mark, made by the voter, on or in a voting square following the word "Yes" or the word "No," before a constitutional amendment or other question submitted, shall be counted in the affirmative or negative as so indicated.

Rule 4. If the voter marks more names than there are persons to be elected or nominated for an office, or elected to a party position, or if for any reason it is impossible to determine the voter's choice of a candidate or candidates for an office or party position, or his vote upon a question, his vote shall not be counted for such office or position or upon the question, but shall be returned as a blank vote thereon.

Rule 5. A cross X mark, made by the voter, on or in a circle above a column, known as a party column, shall be counted as a vote for each candidate named in such column.

Rule 6. If the cross X mark touches a circle or a square, it shall be counted as if on or in such circle or square.

Rule 7. The intent of the voter shall be the primary factor to be considered in determining the voter's choice

on a ballot, and if such intent may be determined on the ballot or part of a ballot then the vote shall be counted as to the candidate or candidates effected [affected] thereby: Provided, however any part of a ballot, from which it is impossible to determine the elector's choice of candidates, shall not be counted as to the candidate, or candidates, affected thereby.

Rule 8. Any ballot on which an elector shall write his name, initials or a number or special symbol such as a star, circle, parallel lines, circle, dots or any combination thereof shall be void. [Acts 1945, ch. 208, §301, p. 680; 1947, ch. 156, §1, p. 481; 1965, ch. 245, §1, p. 624.]

29-5219. Verification of vote on machines.—The county election board may, in any county or city of this state wherein voting machines shall be used, at the time it convenes to count and tally the vote, or as soon thereafter as it conveniently can do so, and either before it proceeds to count and tabulate the vote or within one [1] day after the count and tabulation is finished, inspect the registering counter, or other mechanical recording device on any such voting machine or machines showing the number of votes cast for any candidate or question voted on at any such election and any irregular ballots recorded thereon or therein. In making such inspection the board shall compare the number of votes shown by such voting machine or machines to have been cast for each candidate voted for, on and by such voting machines and each question submitted to the voters voting thereon or thereby with the returns made by the precinct boards of the several precincts in which said voting machines were used at such election. In case there is a discrepancy between the returns so made by the precinct board or boards and the number of votes shown by the voting machines on such inspection,

then it shall be the duty of the county election board to correct the returns made by the precinct election board or boards, so as to make such election returns conform to the vote shown by such machines on such inspection as aforesaid. The corrected returns shall thereupon and thereafter be regarded and deemed by the board as the true and correct return of the number of votes cast for each candidate voted for and each question voted on, in the precinct the returns from which shall have been so corrected.

In case of any election contest the returns of the precinct boards, as corrected by the board as aforesaid, shall be prima facie evidence of the vote cast for each candidate and on each question voted on at any election, to the same extent and in the same manner, and not otherwise, as is the tabulation and return of the vote in precincts where voting machines are not used. For the purpose of inspecting such voting machines the members of the county election board may proceed to any place within the county where the voting machines are located, kept or stored. Provided, That such verification of the voting machine returns shall be made in the presence of a duly accredited representative of each of the two [2] dominant political parties. [Acts 1945, ch. 208, §302, p. 680.]

29-5306. Certificate to secretary of state.—Clerks of the circuit courts, on the day succeeding the return day of such election, shall make out, in words, certified statements, officially sealed, of the number of votes given to each presidential elector, each person for United States senator, for representative in congress, for governor and lieutenant-governor, for judges of the Supreme, Appellate and circuit courts, clerk of the Supreme Court, reporter of the Supreme and Appellate Courts, attorney-general,

prosecuting attorney, superintendent of public instruction, secretary of state [,] auditor, and treasurer of state, and for senator and representative in the general assembly, and shall send the same by registered mail, return receipt requested, to the secretary of state. [Acts 1945, ch. 208, §319, p. 680.]

Compiler's Note: The bracketed comma was inserted by the secretary of state.

29-5307. Error in certification of vote—Correction.—Any error in the certification of the vote for any candidate at any general, special or city election discovered within ten [10] days after such certification shall be corrected by the clerk of the circuit or the secretary of state, as the case may be, making such erroneous certification. Should the clerk of the circuit court or the secretary of state fail or refuse to correct such error, the duty to make the correction may be enforced by an action in mandamus brought by any duly qualified voter within five [5] days after the expiration of the ten [10] day period allowed for making such corrections. Such action shall be brought in the circuit or superior court of the county where the officer or board making the certification is domiciled.

No certificate of election shall be issued until the ten [10] day period for the discovery and correction of errors has expired. [Acts 1945, ch. 208, §320, p. 680.]

29-5309. Congressmen—Duties of secretary of state and governor.—The secretary of state as soon as he shall receive such certified statements, shall compare and estimate the votes given for United States senator and for representative in congress, and certify to the governor the persons having the highest number of votes as duly elected; and the governor shall give to each of the persons returned to him as aforesaid a certificate of his election,

sealed with the seal, and attested by the secretary of state: Provided, That no return of any county which has come into the hands, and which has been duly authenticated by the clerk of the circuit court thereof, under seal, as hereinbefore provided shall be rejected by said secretary of state, but he shall estimate, aggregate and tabulate, and report to the governor the total number of votes cast in each county for each candidate for state office, supreme judge or other officer to be elected by all the voters of the state, and members of congress, as evidenced by the face of such returns so certified to him. [Acts 1945, ch. 208, §322, p. 680.]

29-5803. Purchase of machines—Guaranty—Precincts—Custody while not in use.—The board of commissioners of every county in this state shall adopt and purchase or procure for use in the various precincts of the county, voting machines approved in the manner set forth in this act [chs. 28-60 of this title] by the state election board, and none other: Provided, That the board of commissioners shall purchase or procure no voting machine unless the party or parties selling it shall guarantee, in writing, to keep the machine in working order for not less than five [5] years without additional cost to the county, and give a bond conditional to that effect: Provided, That it shall be the duty of such board of commissioners to adopt and purchase or procure no such machine unless they are themselves satisfied that it complies with the requirements of section three hundred eighty-two [§29-5802] in this act, and that it is thoroughly reliable and correct in its operation, readily understood and operated, can not be fraudulently manipulated, and will unquestionably maintain the secrecy of the ballot: Provided, further, That if it shall be impossible to supply each and every election district with a voting machine or voting machines at any

election following the adoption of such machines in a county, as many shall be supplied as it is possible to procure, and the same shall be used in such precincts of the county as the county election board shall order.

The clerks of the various circuit courts shall have the care and custody of all voting machines while not in use. [Acts 1945, ch. 208, §383, p. 680; 1951, ch. 208, §1, p. 555; 1965, ch. 261, §24, p. 683.]

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~1282~~ 70-66

RICHARD L. ROUDEBUSH,

Appellant,

vs.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

REPLY BRIEF FOR APPELLANT.

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IN THE

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OCTOBER TERM, 1970.

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RICHARD L. ROUDEBUSH,

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R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

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REPLY BRIEF FOR APPELLANT.

ARGUMENT.

I. The Appeal Is Not Moot.

In part I of his Argument (Appellee's Brief, pp. 4-8), appellee Hartke contends that this appeal should be dismissed for mootness. The event occurring subsequent to the filing of this appeal, which is the basis for the claim of mootness, is the fact that "on January 21, 1971, appellee Hartke presented himself to the Senate, claiming membership therein, and was duly sworn and seated." Relying on

Barry v. *United States ex rel. Cunningham*, 279 U. S. 597 (1929),[1] he argues:

> "The jurisdiction of the Senate to determine and adjudicate the right of appellee Hartke to his seat in that body has been invoked. Whatever may have been Roudebush's rights at an earlier moment, no pronouncement by this court can now divest that tribunal of its exclusive jurisdiction; nor can any such pronouncement presently invest the state recount proceedings with any meaning or effect.
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> "This case, in its present posture, is not capable of resolution through the force of any determination by this court. Moreover any such determination would intrude into an area constitutionally committed to another branch of government." (Pages 5-7)

Continuing in footnote 2, appellee argues:

> "That the oath was administered to Senator Hartke, by unanimous consent of the Senate, 'without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order,' * * * does not save the case from mootness. Every senator is seated 'without prejudice' in the sense that *the Senate* may at any time inquire into the merits of his title to the office. * * * But that right

1. The *Barry* case grew out of the election of William S. Vare as United States Senator from Pennsylvania in November, 1926. Prior to the time that Vare claimed his seat, the Senate adopted a resolution appointing a special committee to investigate campaign expenditures and promises, and, in addition, Vare's election was contested by William B. Wilson upon the ground of fraud and unlawful practices in connection with the nomination and election. The Senate refused to permit Vare to take the oath of office pending the outcome of the investigation by the special committee, and the Committee on Privileges and Elections was directed to hear and determine the contest between Vare and Wilson. It was in this context that the court used the language quoted on page 5 of appellee Hartke's brief. By contrast, nothing has as yet been presented to the Senate concerning appellee's Hartke's right to retain his seat as against the appellant.

of inquiry is exclusively in the Senate, and nowhere else." (Page 7)

Since it is appellee Hartke's position that the separation of powers provided by the Constitution deprives this Court of the power to proceed further in this case, it is quite evident that he is confusing "mootness", which goes to the jurisdiction of the Court over the subject matter, with "nonjusticiability", which refers to the inappropriateness of the subject matter for judicial consideration. These are two very different concepts. *Baker* v. *Carr,* 369 U. S. 186, 198 (1962).

With respect to mootness, this Court in *Powell* v. *McCormack,* 395 U. S. 486 (1969), said:

> "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. * * *" (Page 496)

This case has not been mooted by appellee Hartke's seating in the Senate on January 21, 1971, because a live controversy continues to exist between the appellant and appellee Hartke.[2] The term of the Senate seat in dispute does not expire until January 3, 1977.

With respect to justiciability, this Court in *Powell* said:

> "* * * Two determinations must be made in this regard. First, we must decide whether the claim presented and the relief sought are of the type which admit of judicial resolution. Second, we must determine whether the structure of the Federal Government renders the issue presented a 'political question'—that is, a question which is not justiciable in federal court because of the separation of powers provided by the Constitution." (Pages 516-17)

Appellee Hartke does not maintain that this case is not justiciable in the first or general sense. Indeed, it was he

2. See Appellant's Brief at pages 11-15.

who invoked the jurisdiction of the district court for injuctive relief against the Indiana recount statute. This appeal is from the order of the three-judge district court granting the interlocutory injunction sought by appellee Hartke, and appellee Hartke has not challenged appellant's position that this Court has jurisdiction of this direct appeal under 28 U. S. C. § 1253.[3] Accordingly, it must be concluded that, in terms of the general criteria of justiciability, this case is justiciable.

It is in the second sense mentioned in the quotation from *Powell*—*i.e.* that the issue presented is a "political question"—that appellee Hartke claims that the case is not justiciable. His position is "that the right of inquiry is exclusively in the Senate, and nowhere else." Although he concedes that the case was justiciable prior to January 21, 1971, he maintains that it became nonjusticiable when appellee Hartke claimed his seat in the Senate, notwithstanding the fact that the oath was administered without prejudice to the outcome of this appeal and of any recount that might be ordered.

In order for appellee Hartke's claim of nonjusticiability to be sustained, the Court must find "a textually demonstrable constitutional commitment" of the issue involved in this case to the Senate. *Powell* v. *McCormack*, 395 U. S. 486, 518-519 (1969); *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). In other words, the Court must determine the relationship between the power that Article 1, § 4, of the Constitution confers on the States to prescribe the manner of holding elections for Senators and the power that Article 1, § 5, confers on the Senate to judge the elections, returns and qualifications of its members. Far from being a cause

3. At pages 8-11 of the Appellant's Brief, appellant addresses himself to the question of this Court's jurisdiction of this appeal under 28 U. S. C. § 1253. Appellee Hartke's brief contains no discussion addressed to this point.

for dismissal, appellee Hartke's claim of nonjusticiability requires a determination by the Court of this appeal on the merits.

II. The Anti-Injunction Statute Is Applicable to Proceedings Under the Indiana Recount Statute.

In part II of his Argument (Appellee's Brief, pp. 8-16), appellee Hartke contends that a recount proceeding under Article 27 of the Indiana Election Code is not a "proceeding in a State court" to which the anti-injunction statute, 28 U. S. C. § 2283, applies.[4] After summarizing the provisions of the recount statute, he concludes:

> "As the foregoing summary indicates, the role of the court in the recount proceedings is simply to appoint the recount commission. The court finds no facts and enters no judgment, nor does any direct judicial review lie from the recount commission's determination. Although each affected candidate is entitled to be present himself and to have a 'watcher' present, the recount proceedings are not adversary in character, and the candidates have no right to participate in them. The commission—and not the court or the candidates—conducts the recount. Indiana courts (and both appellants) recognize the ministerial—rather than judicial—character of recount proceedings. See *State ex rel. McCormick* v. *Superior Court of Knox County*, 229 Ind. 118, 95 N. E. 2d 829 (1951); *State ex rel. Watson* v. *Pigg*, 221 Ind. 23, 46 N. E. 2d 232 (1943); Brief for Appellant Roudebush, pp. 32-33; Brief for Appellant Sendak, p. 22.
>
> "Where the function of the court is not judicial, as thus determined, the anti-injunction statute has no application at all. * * * " (Pages 12-13)

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4. Appellee Hartke's brief makes no attempt to defend the position of the court below that 28 U. S. C. § 2283 is, in essence, a statutory adoption of the doctrine of comity and hence discretionary in its application.

Appellee Hartke's conclusion that the function of the court in a recount proceeding is not judicial is incorrect. In *State ex rel. Watson* v. *Pigg*, 221 Ind. 23, 46 N. E. 2d 232 (1943), which appellee Hartke himself relies upon, the court said:

> "• • • With the exceptions hereinafter noted all the duties prescribed therein [the recount statute] seem to be ministerial. *The judge apparently is required to determine that the petition complies with the statute for in § 9 it is provided that he 'shall grant such petition . . . and order the recount . . .' It would seem that he ought to satisfy himself judicially that the proceedings are regular before he makes such an order which in itself is probably a judicial act.* When the order is made, including the appointment of the commissioners, they act ministerially pursuant to such order. It is not required that the judge shall preside over or participate in the examination or count of ballots. But by § 13 he is required by order to impound and provide for the protection of ballots and machines and 'make the same available to said commission.' So, generally, the recount is and necessarily must be under his supervision." (Emphasis added) (221 Ind. at 34)

That the court acts judicially in an election recount proceeding is demonstrated by proceedings set forth in the Appendix on this appeal that were had in the Superior Court of Marion County, Room 3. After the appellant filed his petition for recount of the votes in specified Marion County precincts (A. 8-11), appellee Hartke filed a motion to dismiss the petition, pursuant to Trial Rule 12 of the Indiana Rules of Procedure, for the reason that the court lacked jurisdiction over the subject matter of the action. (A. 12) In his supporting memorandum he argued that the recount statute was unconstitutional as applied to legislative offices. (A. 13-17) The Superior Court of Marion County, Room 3, filed a written opinion upholding the constitutionality of the recount statute and overruling the

motion to dismiss. (A. 18-23) Thereupon, the court entered an order granting appellant's petition and ordering the recount. (A. 24-26) At this point appellee Hartke filed his complaint for injunctive relief in the court below (A. 4-7), and Judge Dillin issued the temporary restraining order without notice. (A. 31-32) Can it be doubted that the Superior Court of Marion County, Room 3, was acting judicially in ruling on appellee Hartke's motion to dismiss and upholding the constitutionality of the recount statute?

In *Hill* v. *Martin*, 296 U. S. 393 (1935), it was said that, in determining whether a judicial proceeding is pending for purposes of the anti-injunction statute, this Court looks to the law of the State. Looking, then, to the law of Indiana, it is clear that the court acts judicially in approving a petition for recount and in ordering the recount. *State ex rel. Watson* v. *Pigg, supra.* That the actual recount of the votes is conducted by ministerial officers appointed by the court does not deprive the proceeding of its judicial character. In *Hill* v. *Martin, supra,* it was also said:

> "*Fourth.* The prohibition of § 265 is against a stay of 'proceedings in any court of a state.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of res judicata. *It applies alike to action by the court and by its ministerial officers;* applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other. And it governs a privy to the state court proceeding—like Elinor Dorrance Hill—as well as the parties of record. *Thus, the prohibition applies whatever the nature of the proceeding, unless the case presents facts*

which bring it within one of the recognized exceptions to Section 265. It is not suggested that there is a basis here for any such exception." (Emphasis added) (296 U. S. at 403)

Further light is shed on the judicial character of the recount proceeding by the language of this Court in *Public Service Co.* v. *Corboy,* 250 U. S. 153 (1919). The Court, in speaking of the anti-injunction statute, said:

> "Be this as it may, it is certain that the prohibitions which the statute imposes secure only the right of the state courts to exert their judicial power; that is, a power called into play alone between parties to a controversy, and the operation of which power when exerted was, from the very fact that it was judicial, confined to the parties, their duties, interests, and property; in other words, to a power falling within the general limitation of things judicial as demarked by the great distinction between legislative, executive, and judicial power upon which the Constitution was framed. This is the necessary result of the ruling in the Prentis Case, by which it is made certain that although a state may have power to confer upon its courts such authority as may be deemed appropriate, it cannot by the exertion of such right, draw into the judicial sphere powers which are intrinsically legislative and executive or both, and thus bring the exercise of such powers within the scope of the prohibition of the statute, with the result of depriving the courts of the United States to that extent of their omnipresent authority to enforce the Constitution.
>
> "It follows necessarily, therefore, that although the Constitution did not limit the power of the states to create courts and to confer upon them such authority as might be deemed best for state purposes, that right could not, by its execution, restrain or limit the power of the courts of the United States by bringing within the state judicial authority subjects which, in their constitutional sense, were nonjudicial in character, and therefore not within the implied or express limitation by

> which courts of the United States were restrained from staying judicial proceedings in state courts. To hold to the contrary would be in large measure to recognize that the exertion of the authority of the courts of the United States was dependent, not upon the nature and character of the subject matter with which they are called upon to deal, but merely upon a state classification.'' (Pages 161-62)

Corboy involved a suit against a drainage commissioner, whom a state court, after having established a drainge district and authorized the construction of a ditch, had appointed to do the work, to enjoin the execution of the work on the ground that the effect of the ditch would be to draw off from an interstate stream such a quantity of water as seriously to diminish the flow in that stream. This Court held that the construction of a drainage ditch was not a subject of the judicial power and that the prohibition of the anti-injunction statute did not apply. Likewise, in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210 (1908), relied on by appellee Hartke, it was held that the anti-injunction statute did not prevent a suit to enjoin the Virginia State Corporation Commission, which was a court for some purposes, from enforcing certain railroad rates that it had established, because the power to fix rates is legislative and not judicial.

By contrast, recounting the votes cast at an election is a subject that can properly be brought within the state judicial authority. In the absence of any state statute granting the right to a recount, such relief can be obtained by the common law remedy of quo warranto or its statutory successors. 44 Am. Jur., *Quo Warranto*, § 27. There can be no question but that quo warranto is a judicial proceeding.

In *State ex rel. Watson* v. *Pigg*, 221 Ind. 23, 46 N. E. 2d 232 (1943), it was said, in respect of the Indiana recount statute, ''that recount is in the nature of discovery, may or

may not be used as an aid to the contest, and does not finally decide the right to hold the office." (221 Ind. 31) But treating recount purely as a means of discovery, it still can properly be brought within the state judicial authority. "The power to enforce discovery is one of the original and inherent powers of a court of equity." 23 Am. Jur. 2d, *Deposition and Discovery*, § 141.

Proceedings under Article 27 of the Indiana Election Code in a circuit or superior court for recount of votes cast are clearly "proceedings in a State court" within the contemplation of 28 U. S. C. § 2283.

III. The Indiana Recount Statute Does Not Conflict With the Senate's Prerogative to Judge the Elections, Returns and Qualifications of Its Members.

In part III of his Argument (Appellee's Brief, pp. 17-21), appellee Hartke discusses the three decisions of the Indiana Supreme Court that held the Indiana recount statute unconstitutional with respect to elections of members of the Indiana General Assembly.[5] As appellant has already pointed out (Appellant's Brief, pp. 30-31), these cases cannot control the constitutionality of the recount statute as it applies to the election of a United States Senator. It is worthy of note that neither the Superior Court of Marion County, Room 3, nor the Lake Circuit Court, in overruling appellee Hartke's motions to dismiss the recount proceedings, felt bound by such decisions.

Appellee Hartke argues (pp. 17-18) that, because of these three decisions, there was no necessity for the district court to postpone the exercise of its jurisdiction in

5. The cases in question are *State ex rel. Acker* v. *Reeves*, 229 Ind. 126, 95 N. E. 2d 838 (1951); *State ex rel. Beaman* v. *Circuit Court of Pike County*, 229 Ind. 190, 96 N. E. 2d 671 (1951); and *State ex rel. Batchelet* v. *DeKalb Circuit Court*, 248 Ind. 481, 229 N. E. 2d 798 (1967).

deference to state court resolution of underlying issues of state law. But appellant has never suggested that the district court should have invoked the doctrine of abstention. No question of state law is presented that might have rendered unnecessary the decision of the federal constitutional question.[6] The recount statute expressly applies to elections for the office of United States Senator. See Burns' Indiana Statutes § 29-5402. (Appellant's Brief, p. A2) The authority for applying the recount procedure to the office of United States Senator is not found in the Constitution of Indiana but in Article 1, § 4, of the Constitution of the United States. Thus, nothing said in any decision by the Supreme Court of Indiana would be binding with respect to the constitutional issue presented in this case.

Finally, in part IV of his Argument (Appellee's Brief, pp. 21-27), appellee Hartke discusses the procedure for tallying the vote under the Indiana Election Code and contends "that a recount would not only encroach upon the constitutional duty of the Senate under Article 1, § 5, but that to permit recounts to go forward would impair the ability of the Senate to perform its constitutional obligation." (Page 25) It suffices to say in answer to this argument that the Senate itself disagrees with it. See S. Rept. No. 1284, 80th Cong., 2d Sess. (1948), which is discussed on page 37 of appellant's brief.

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6. On the other hand, a decision on the federal constitutional question would be unnecessary if 28 U. S. C. § 2283 is applicable, or if the complaint is insufficient to invoke the equity jurisdiction of the court.

CONCLUSION.

The order of the district court granting the interlocutory injunction appealed from should be reversed and the cause remanded to the district court with directions to dismiss the action.

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IN THE

Supreme Court of The United States

OCTOBER TERM 1970

~~NO. 1230~~

THEODORE L. SENDAK
Attorney General of
the State of Indiana,
Appellant,

v.

R. VANCE HARTKE, et al,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

APPELLANT'S REPLY BRIEF

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

APPELLANT'S REPLY BRIEF

ARGUMENT

I.

THE CASE IS NOT MOOT

Appellee Hartke has reiterated his claim that this appeal is moot since the United States Senate has already seated him. However, the seating was "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order." 117

Cong. Rec. S 4, 21 Jan. 1971. Appellees' mootness argument glosses over this explicit expression of Senatorial deference by arguing that every Senator is seated "without prejudice" in the sense that *the Senate* may at any time inquire into the merits of his title to the office." (Br., p. 7, n. 2). Appellants do not question that the Senate may always inquire into the title to the office of its members. But where the state recount procedure does not conflict with the senatorial prerogative and is in aid of it, and where the Senate itself has recognized the viability of this appeal as being unprejudiced by its seating of appellee Hartke, it would appear that a claim of mootness by reason of the seating of appellee Hartke is misdirected.

It is in part misdirected because appellee Hartke has incorrectly sought to characterize this appeal as an attempt to compel the seating of appellant Roudebush. All the appeal seeks to accomplish is the holding of a recount procedure—a discovery procedure—in Indiana for the office of Senator. Thus appellee Hartke is incorrect in stating that:

> "This case in its present posture, is not capable of resolution through the force of any determination by this court. Moreover any such determination would intrude into an area constitutionally committed to another branch of government." (Brief pp. 6-7).

This case *is* capable of "resolution" by a determination of this Court. "Resolution" would simply require a recount of this vote. Because the Senate is the ultimate arbiter of whom it seats, the recount itself cannot compel the seating of either candidate. But it is very clear that despite the Senate's ultimate prerogative to judge, appellant Roudebush is entitled to have a recount conducted. That is what this appeal seeks. That is the "resolution" which this Court can accomplish.

Implicit in the appellees' argument of mootness is the notion that the recount conflicts with the rights of the Senate to judge the elecctions of its own members. Appellee Hartke implies that the state recount would conclusively settle the question of the election and that it is an attempt to bar the Senate's consideration of the matter:

> ". . . no pronouncement by this court can now divest that tribunal [Senate] of its exclusive jurisdiction; nor can any such pronouncement presently invest the state recount proceedings with any meaning or effect." (Brief, pp. 5-6).

This appeal can result in a recount. The "meaning or effect" of the recount will be as a discovery tool, as Appellants have claimed all along. The recount itself will not *per se,* seat appellant Roudebush in the Senate, but will disclose which candidate actually received the most votes cast. Appellant Roudebush's right to a recount, the function of which is informative, is clear. Appellee Hartke's right to have the Senate judge the elections of its members is clear. Neither right is in conflict with the other.

Appellee Hartke also contends that the case is moot because there is no controversy between appellee Hartke and appellant Sendak, as Indiana Attorney General, and that the Federal District Court should not have allowed the Attorney General to intervene. (Brief, p. 7). Since this is the first objection by appellee Hartke to the Attorney General's intervention, it comes too late. The interest of the Attorney General stems from his statutory duty to defend the constitutionality of a state statute when attacked. IC 1971, 34-4-10-11, as found in Burns' (1968 Repl.), Section 3-1111. In any event, the matter of permissive intervention under F.R.C.P. 24(b) is one largely for the discretion of the trial court. Barron and Holtzoff, vol. 2, § 602. This appeal is not moot.

II.

THE RECOUNT IS INFORMATIVE AND DOES NOT CONFLICT WITH THE RIGHTS OF THE SENATE

As has been previously stated, the recount is used as a vital tool to determine whether the declared winner did, in fact, garner the most votes. Whether the Senate would actually deem itself bound by the results of the recount cannot be predicted with certainty. However, two state courts have expressed confidence that the results of a recount would not be ignored.

> "Respondents and intervenor contend that since Congress, under the provisions of Art. 1, Sec. 5, supra, is the ultimate judge 'of its own Members' it may refuse to seat petitioner notwithstanding a recount of the votes may show that he in fact received more votes than Wheeler. Although Congress may have such power, we do not agree with respondents' suggestion that to accept jurisdiction herein and grant relief we will be doing a vain or futile thing. We are not convinced that Congress will refuse to recognize the result of a recount or a Certificate of Election issued in accordance with the recount. * * *" *Wickersham v. State Election Board*, 357 P. 2d 421, 424-425 (Okla. 1960)

* * *

> "Within the scope of the elective process, our legislature could have provided for a recount of the votes under supervision of our courts when the original tabulation was questioned by one of the candidates. If it had done so as part of the elective process, as many of the other states have done, we do not doubt that Congress would accept the original tally without a recount." *Odegard v. Olson* (1963) 264 Minn. 439, 119 N.W. 2d 717, 721.

Appellee Hartke puts great emphasis on the evidence, which he contends, shows that the recount commission could have committed a "misadventure" in the handling of the election material which would have a harmful effect on the Senate's ability to determine the winner of the election. Yet, the same potential danger is even more likely in the original count. The Senate does not conduct the original vote count, despite the potential danger of "misadventures." The recount is on no different footing in this regard. When carried to its logical conclusion, the appellees' reasoning would require masses of vote counters to be appointed by the Senate in every election to avoid the possibility of any harm to the ballots on the original count, as well as the recount. That is the only way the "integrity" of the ballots could be preserved to the satisfaction of the appellee.

It was stated in the brief of appellant Roudebush, that in *Herbert R. O'Conor v. D. John Markey of Maryland,* Senate Cases, pp. 144-145, the Senate itself impliedly spoke, that if Maryland law had provided for a recount, it would have been unnecessary for the Senate to have conducted the recount.

III.

THE RECOUNT IS A "PROCEEDING IN A STATE COURT"

Appellee Hartke claims that the recount is not a proceeding in a state court. To buttress this theory he has characterized the recount as ministerial, therefore, not a proceeding in a state court.

However, the injunction entered by the district court operated not only to stay the recount itself, but nullified

all the state judicial proceedings in the Marion Superior Court leading up to the recount. The Superior Court judge specifically held, in overruling Hartke's motion to dismiss, that the recount statute was constitutional. This decision, clearly a "proceeding" in a state court, was enjoined by the U.S. District Court.

Viewed as a whole, the activity in the Marion Superior Court which was enjoined by the District Court was clearly a "proceeding in a state court."

Other courts have held a variety of activities to constitute "proceedings in a state court" short of the traditional trial litigation. For instance in *Geiger v. Jenkins* 316 F.Supp. 370 (N.D. Ga. 1970) the court found that a proceeding before the State Board of Medical Examiners to revoke the plaintiff's license to practice was a proceeding in a state court for purposes of applying 28 U.S.C. §2283. In *Drexler v. Walters* 290 F. Supp. 150 (D.C. Minn. 1968) the District Court held that 28 U.S.C. § 2283 barred an injunction against a state-court appointed receiver who was invading the plaintiff's mailbox as part of the enforcement of a divorce judgment. In *Machay v. Nesbett* 285 F.Supp. 498 (D.C. Alaska 1968), a district court held that it was barred by 28 U.S.C. 2283 from enjoining the disciplinary action of the Alaskan Supreme Court in suspending the plaintiff from the practice of law. A district court in New York refused, under 28 U.S.C. 2283 to enjoin various sheriffs from carrying out orders of attachment issued by a local court, finding that they were ministerial officers of New York courts and, as such, could not be enjoined because the sheriff's execution was a "proceeding in a state court." *Nationwide Mutual Insurance Co. v. Vaager* 265 F. Supp. 556, (S.D.N.Y. 1967). In yet another case, a surety had deposited securities with the state insurance commissioner. After a state court held

the surety was liable on a bond, the insurance commissioner sought to sell the securities to recover on the appearance bonds. This was held to be a "proceeding" within the ambit of § 2283 as interpreted by *Hill v. Martin* 296 U.S. 393 (1935). *Resolute Insurance Co. v. State of North Carolina*, 276 F.Supp. 660 (E.D.N.C. 1967). And finally, in *Guerra v. Gonzalez*, 340 F. 2d. 227, (5th Cir. 1965) the Court of Appeals was asked to restrain the holding of "a contest of a city bond election in the District Court of Starr County, Texas." The Court wrote:

• • •

> "The district court dismissed the action on motion of the defendants and the plaintiffs have appealed. The action of the district court was based upon its view that the court was without jurisdiction to enjoin the election contest proceeding in the state court . . .
>
> • • •
>
> We are satisfied that the suit was rightly dismissed. Section 2283 of title 28, U.S.C., expressly prohibits the granting of an injunction by a federal court staying proceedings in a state court, except in limited circumstances not here present. ***The election contest here involved was a proceeding in a state court within the protection of that statute.***" 340 F. 2d at 228. (Emphasis added.)

These cases implemented *Hill v. Martin, supra;* where this Court said:

> "The prohibition of section 265 is against a stay of 'proceedings in any court of a state.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process." 296 U.S. at 403.

This clear requirement should be applied to the case at hand.

In Indiana a recount proceeding is initiated by filing a petition for recount with the state court. IC 1970 3-1-27-3, as found in Burns' (1969 Repl.), Section 29-5403. The judge may grant consolidation where there is more than one petition pending. IC 1970 3-1-27-4, as found in Burns' (1969 Repl.), Section 29-5404. Also, the judge may allow amendment of the petition. IC 1970 3-1-27-5, as found in Burns' (1969 Repl.), Section 29-5405. The court must approve the filing of a bond for payment of costs. IC 1970 3-1-27-8, as found in Burns' (1969 Repl.), Section 29-5408. The court then grants the petition and appoints the recount commission members. IC 1970 3-1-27-9, as found in Burns' (1969 Repl.), Section 29-5409. The date and place the commission is to convene and begin the recount is fixed by the court. IC 1970 3-1-27-11, as found in Burns' (1969 Repl.), Section 29-5411. The court has the duty of providing for the protection of all ballots, voting machines and tally sheets and making them available to the recount commission. IC 1970 3-1-27-13, as found in Burns' (1969 Repl.), Section 29-5413. When the commission has completed its tally, it makes a certificate showing the total votes received by the candidates and files it with the circuit court clerk who then enters the findings in the order book of the court. The clerk, a ministerial officer of the court, is then required to certify the vote to the secretary of state. IC 1970, 3-1-27-14, as found in Burns' (1969 Repl.), Section 29-5414.

The above features of the recount procedure as provided by statute show that the recount is a "proceeding in a state court" within the scope of *Hill v. Martin*.

CONCLUSION

For the foregoing reasons the decision and order of the District Court should be reversed with directions to dismiss the action.

Respectfully submitted,

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ROUDEBUSH *v.* HARTKE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 70–66. Argued December 13, 1971—Decided February 23, 1972*

Incumbent Senator Hartke was certified by the Indiana Secretary of State to the Governor as the winner of the close 1970 Indiana senatorial election. Candidate Roudebush filed a timely recount petition in state court. The state court denied Hartke's motion to dismiss on the grounds of conflict with the Indiana and Federal Constitutions, and granted the petition for a recount. Hartke sought an injunction against the recount in United States District Court, invoking jurisdiction under 28 U. S. C. § 1343 (3) and claiming that the recount was barred by Art. I, § 5, of the Federal Constitution, delegating to the Senate the power to judge the elections, returns, and qualifications of its members. The three-judge District Court issued the requested injunction. After appeals were filed here, the Senate seated Hartke "without prejudice to the outcome of an appeal pending in the Supreme Court . . . and without prejudice to the outcome of any recount that the Supreme Court might order." Hartke then moved to dismiss the appeals as moot. *Held:*

1. The issue here, whether a recount is a valid exercise of the State's power to prescribe the times, places, and manner of holding elections, pursuant to Art. I, § 4, of the Constitution, or is a forbidden infringement on the Senate's power under Art. I, § 5, is not moot, as the Senate has postponed making a final determination of who is entitled to the office of Senator pending the outcome of this action. Pp. 18–19.

2. The District Court was not barred from issuing an injunction by 28 U. S. C. § 2283, which generally prohibits a federal court from enjoining state court proceedings. Pp. 20–23.

(a) That section does not restrict a federal court from enjoining a state court acting in a nonjudicial capacity. P. 21.

(b) The state court's recount functions are nonjudicial, as they consist merely of determining that the recount petition is correct as to form and appointing recount commissioners. Pp. 21–22.

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*Together with No. 70–67, *Sendak, Attorney General of Indiana* v. *Hartke et al.*, also on appeal from the same court.

(c) The complaint did not seek to enjoin the action of the state court but rather to enjoin the recount commission from proceeding after the court had appointed members of the commission. P. 22.

3. Article I, § 5, does not prohibit a recount of the ballots by Indiana, as the recount will not prevent an independent Senate evaluation of the election any more than the original count did, and it would be mere speculation to assume that Indiana's procedure would impair the Senate's ability to make an independent final judgment. Pp. 23–26.

321 F. Supp. 1370, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, in which BRENNAN, J., joined, *post*, p. 26. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the cases.

Donald A. Schabel argued the cause for appellant in No. 70–66. With him on the briefs was *L. Keith Bulen*. *Richard C. Johnson*, Chief Deputy Attorney General of Indiana, argued the cause for appellant in No. 70–67. On the briefs were *Theodore L. Sendak*, Attorney General, *pro se*, *William F. Thompson*, Assistant Attorney General, and *Mark Peden*, Deputy Attorney General.

John J. Dillon argued the cause for appellees in both cases. With him on the brief for appellee Hartke were *David W. Mernitz* and *James L. Tuohy*.

MR. JUSTICE STEWART delivered the opinion of the Court.

The 1970 election for the office of United States Senator was the closest in Indiana history. The incumbent, Senator R. Vance Hartke (Hartke), was declared the winner by a plurality of 4,383 votes—a margin of approximately one vote per state precinct. On November 16, 1970, 13 days after the election, the Indiana Secretary of State certified to the Governor that Hartke

had been re-elected. On the following day, candidate Richard L. Roudebush (Roudebush) filed in the Superior Court of Marion County a timely petition for a recount.[1] Hartke moved in that court to dismiss the petition, arguing that the state recount procedure conflicted with the Indiana and Federal Constitutions. On December 1, the state court denied the motion to dismiss and granted the petition for a recount. It appointed a three-man recount commission and directed it to begin its task on December 8.

Hartke then filed a complaint in the United States District Court for the Southern District of Indiana asking for an injunction against the recount. He invoked federal jurisdiction under 28 U. S. C. § 1343 (3) [2] and claimed that the recount was prohibited by Art. I, § 5, of the Constitution of the United States, which delegates to the Senate the power to judge the elections, returns, and qualifications of its members.[3] A single district

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[1] Roudebush filed similar petitions in 10 other counties. Recounts in all 11 counties have been postponed, pending the outcome of this cause.

[2] 28 U. S. C. § 1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

The District Court apparently viewed the suit as substantively based upon 42 U. S. C. § 1983, which authorizes a civil action on the part of a person deprived, under color of state law, "of any rights, privileges, or immunities secured by the Constitution . . . ."

[3] U. S. Const., Art. I, § 5, provides in pertinent part:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."

judge issued an order temporarily restraining the recount pending decision by a three-judge district court. The Attorney General of Indiana then moved successfully to intervene as a defendant, and a three-judge court was convened pursuant to 28 U. S. C. § 2284. After taking testimony and hearing argument, the court ruled in Hartke's favor and issued an interlocutory injunction, 321 F. Supp. 1370, one judge dissenting. Roudebush and the Attorney General both brought direct appeals to this Court.[4]

On January 21, 1971, shortly after the jurisdictional statements were filed, the Senate administered the oath of office to Hartke, who had been issued a certificate of election by the Governor. Hartke was seated, however, "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order. . . ."[5] Following the Senate's decision to seat him, Hartke moved to dismiss the appeals as moot. We consolidated both appeals and postponed further consideration of questions of jurisdiction to the hearing of the cause on the merits. 401 U. S. 972.

I

We consider first the claim that this appeal is moot. This claim is based upon the proposition, as stated in appellee Hartke's brief, that the "basic issue" before the Court is "whether appellee Hartke or appellant Roudebush is entitled to the office of United States Senator from Indiana." Since the Senate has now seated Hartke, and since this Court is without power to alter the Sen-

[4] Direct appeals from such interlocutory orders are authorized by 28 U. S. C. § 1253.

[5] 117 Cong. Rec. S 4 (daily ed. Jan. 21, 1971).

ate's judgment,[6] it follows, the argument goes, that the cause is moot.

The difficulty with this argument is that it is based on an erroneous statement of the "basic issue." Which candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this Court even before the Senate acted.[7] The actual question before us, however, is a different one. It is whether an Indiana recount of the votes in the 1970 election is a valid exercise of the State's power, under Art. I, § 4, to prescribe the times, places, and manner of holding elections,[8] or is a forbidden infringement upon the Senate's power under Art. I, § 5.

That question is not moot, because the Senate has postponed making a final determination of who is entitled to the office of Senator, pending the outcome of this lawsuit. Once this case is resolved and the Senate is assured that it has received the final Indiana tally, the Senate will be free to make an unconditional and final judgment under Art. I, § 5. Until that judgment is made, this controversy remains alive, and we are obliged to consider it.[9]

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[6] See *Reed* v. *County Comm'rs*, 277 U. S. 376, 388: The Senate "is the judge of the elections, returns and qualifications of its members. Art. I, § 5. It is fully empowered, and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department."

[7] *Powell* v. *McCormack*, 395 U. S. 486.

[8] U. S. Const., Art. I, § 4, provides in pertinent part:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

[9] See *Powell* v. *McCormack*, *supra*, at 496.

II

It is the position of the appellants that, quite apart from the merits of the controversy, the three-judge District Court was barred from issuing an injunction by reason of 28 U. S. C. § 2283, which prohibits a federal court from enjoining state court proceedings except in a few specific instances.[10] This argument has weight, of course, only if the Indiana statutory recount procedure is a "proceeding in a State court" within the meaning of § 2283. This Court has said of a predecessor to § 2283,[11] "The provision expresses on its face the duty of 'hands off' by the federal courts in the use of the injunction to stay *litigation* in a state court." [12] More recently, we characterized the statute as designed to assure "the maintenance of state judicial systems for the decision of *legal controversies.*" [13]

We have in the past recognized that not every state court function involves "litigation" or "legal controversies." In the case of *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210, the Court reviewed a federal injunction preventing a state commission from fixing passenger rail rates. The Court assumed that the commission had the powers of a state court and that the predecessor of § 2283 governed any attempt by a federal court to enjoin the exercise of the commission's judicial powers.

[10] 28 U. S. C. § 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[11] The statute dates from 1793. Act of March 2, 1793, § 5, 1 Stat. 334.

[12] *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 132. (Emphasis supplied.)

[13] *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U. S. 281, 285. (Emphasis supplied.)

Nevertheless, the Court concluded that rate-making could be enjoined because it was legislative in nature. Hence, the Court held that § 2283 does not restrict a federal court from enjoining a state court when it is involved in a nonjudicial function.

To determine whether an Indiana court engages in a judicial function in connection with an election recount, we turn to the law of that State.[14] In Indiana every candidate has a right to a recount and can obtain one by merely filing a timely petition in the circuit or superior court of the appropriate county. If the petition is correct as to form, the state court "shall . . . grant such petition . . . and order the recount . . . ." When it grants a petition, the court is required to appoint three commissioners to carry out the recount. Once these appointments are made, the Indiana court has no other responsibilities or powers.[15]

The exercise of these limited responsibilities does not constitute a court proceeding under § 2283 within the test of *Prentis*: "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end." 211 U. S., at 226. The state courts' duties in connection with a recount may be characterized as ministerial, or perhaps administrative, but they clearly do not fall within this definition of a "judicial inquiry." The process of determining that the recount petition is correct as to form—that it contains the proper information, such as the names and addresses of all candidates, and is timely filed—is clearly not a judicial proceeding. Nonjudicial functionaries

[14] See *Hill* v. *Martin*, 296 U. S. 393, 398.

[15] Ind. Ann. Stat. §§ 29-5401 through 29-5417. The election recount provisions of some other States appear to give the state courts a broader function. See, e. g., Conn. Gen. Stat. Rev. § 9-323; Va. Code Ann. § 24-277.1 (1969).

continually make similar determinations in the processing of all kinds of applications.[16]

And finally, Hartke's complaint in this cause did not ask the three-judge federal court to restrain the action of the Indiana court as such. It did not seek to enjoin the state court from ruling on the formal correctness of the petition; it did not even seek to enjoin the state court's appointive function. It sought, rather, to enjoin the recount commission from proceeding after the court had appointed the members of the commission.[17]

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[16] The role of the Indiana courts in this connection is not unlike that of the state court in the case of *Public Service Co. of Northern Illinois* v. *Corboy*, 250 U. S. 153. A state statute there authorized property owners to petition a state court to establish a drainage district and to construct a drainage ditch. To assist in the planning of a ditch, the state court was empowered to appoint a drainage commissioner. The commissioner served on a commission that submitted plans for construction. The state court could either accept or reject these submissions. If it approved plans, the court allocated funds and supervised construction. Applying *Prentis*, this Court held that these activities were not judicial, and that enjoining the construction of a drainage ditch was not enjoining a state court "proceeding." See also *Central Electric & Gas Co.* v. *City of Stromsburg*, 192 F. Supp. 280, aff'd, 289 F. 2d 217 (federal court could enjoin a state court's appointment of an appraiser pursuant to a state statute); *Central R. Co. of New Jersey* v. *Martin*, 19 F. Supp. 82, aff'd *sub nom. Lehigh Valley R. Co.* v. *Martin*, 100 F. 2d 139 (federal court could enjoin ministerial act of state judge, pursuant to state statute, converting a state tax into a lien against the taxpayer); *Weil* v. *Calhoun*, 25 F. 865 (CCND Ga. 1885) (federal court could enjoin a state ordinary, having the powers of a probate judge, from declaring the results of a county election).

[17] The only injunctive relief sought in Hartke's amended complaint was "that the court permanently restrain and enjoin the defendants and restraining and enjoining the defendants Samuel Walker, R. Hammond and Duge Butler [the recount commissioners] from convening and commencing a recount, and the defendant Richard L. Roudebush and all persons acting in his behalf or in concert with him [from] taking any further action to use said machinery and procedures to carry forward a recount of the vote

We conclude that the three-judge District Court was not prohibited by § 2283 and had power under 28 U. S. C. § 2281 to issue an injunction in this cause.

III

We turn, therefore, to the merits of the District Court's decision. The Indiana Election Code calls for the vote to be initially counted, in each precinct, by an election board. After recording the voting machine totals, the board seals the machines. Paper ballots, including absentee ballots, are then counted and tallied. Counted ballots are placed in a bag and sealed. Ballots that bear distinguishing marks or are mutilated or do not clearly reveal the voter's choice are not counted. These rejected ballots are sealed in a separate bag. Both bags are preserved for six months and may not be opened except in the case of a recount.[18]

If a recount is conducted in any county, the voting machine tallies are checked and the sealed bags containing the paper ballots are opened. The recount commission may make new and independent determinations as to which ballots shall be counted. In other words, it may reject ballots initially counted and count ballots initially rejected. Disputes within the commission are settled by a majority vote. When the commission finishes its task it seals the ballots it counted in one bag, and the ballots it rejected in another. Once the recount is completed, all previous returns are superseded.[19]

The District Court held these procedures to be contrary to the Constitution in two ways. First, the court found that in making judgments as to which ballots to

for the office of United States Senator in the general election of November 3, 1970." An interlocutory injunction against the same defendants was also sought.

[18] Ind. Ann. Stat. §§ 29–5201 through 29–5220.

[19] Ind. Ann. Stat. §§ 29–5401 through 29–5417.

count, the recount commission would be judging the qualifications of a member of the Senate. It held this would be a usurpation of a power that only the Senate could exercise. Second, it found that the Indiana ballots and other election paraphernalia would be essential evidence which the Senate might need to consider in judging Hartke's qualifications. The court feared that the recount might endanger the integrity of those materials and increase the hazard of their accidental destruction. Thus, the court held that, even if the commission would not be usurping the Senate's exclusive power, it would be hindering the Senate's exercise of that power.

We cannot agree with the District Court on either ground.[20] Unless Congress acts, Art. I, § 4, empowers the States to regulate the conduct of senatorial elections.[21] This Court has recognized the breadth of those powers: "It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the

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[20] The District Court cited three cases decided by the Indiana Supreme Court as authority for its rulings. *State ex rel. Batchelet* v. *Dekalb Circuit Court*, 248 Ind. 481, 229 N. E. 2d 798; *State ex rel. Beaman* v. *Circuit Court of Pike County*, 229 Ind. 190, 96 N. E. 2d 671; *State ex rel. Acker* v. *Reeves*, 229 Ind. 126, 95 N. E. 2d 838. These cases held that the Indiana Constitution prohibited recounts in certain state elections. They do not address the federal constitutional question at issue in this cause.

[21] See n. 8, *supra*.

fundamental right involved." *Smiley* v. *Holm*, 285 U. S. 355, 366.

Indiana has found, along with many other States, that one procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount. Despite the fact that a certificate of election may be issued to the leading candidate within 30 days after the election, the results are not final if a candidate's option to compel a recount is exercised.[22] A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, § 4.

It is true that a State's verification of the accuracy of election results pursuant to its Art. I, § 4, powers is not totally separable from the Senate's power to judge elections and returns. But a recount can be said to "usurp" the Senate's function only if it frustrates the Senate's ability to make an independent final judgment. A recount does not prevent the Senate from independently evaluating the election any more than the initial count does. The Senate is free to accept or reject the

[22] The Secretary of State is required by statute to certify to the Governor the leading candidate as duly elected "as soon as he shall receive" certified statements from the counties. The statutory period for receiving those statements is 26 days. The Governor is required to give a certificate of election to each certified candidate. Ind. Ann. Stat. §§ 29–5306 through 29–5309.

A petition for a recount may be filed 15 days after the election is held. § 29–5403. The petition cannot be granted nor the recount commission appointed by the court for another 25 days. § 29–5409. The recount may not commence until at least five days after the commission is appointed. § 29–5411. Additional time elapses before the results are made final and the appropriate persons are notified. Thus, the recount is unlikely to be completed before the Governor becomes obligated by statute to issue a certificate of election based on the initial count. Nevertheless, the recount supersedes the initial count even though a certificate of election may have been issued. § 29–5415.

apparent winner in either count,[23] and, if it chooses, to conduct its own recount.[24]

It would be no more than speculation to assume that the Indiana recount procedure would impair such an independent evaluation by the Senate. The District Court's holding was based on a finding that a recount would increase the probability of election fraud and accidental destruction of ballots. But there is no reason to suppose that a court-appointed recount commission would be less honest or conscientious in the performance of its duties than the precinct election boards that initially counted the ballots.

For the reasons expressed, we conclude that Art. I, § 5, of the Constitution, does not prohibit Indiana from conducting a recount of the 1970 election ballots for United States Senator. Accordingly, the judgment of the District Court is reversed.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting in part.

While I agree with the Court that the cases are not moot and that the three-judge court was not barred by 28 U. S. C. § 2283 from issuing an injunction, I disagree on the merits.

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[23] The Senate's power to judge the qualifications of its members is limited to the qualifications expressly set forth in the Constitution. *Powell* v. *McCormack*, 395 U. S. 486. One of those qualifications is that a Senator be elected by the people of his State. U. S. Const., Amend. XVII.

[24] The Senate itself has recounted the votes in close elections in States where there was no recount procedure. *E. g., O'Conor* v. *Markey*, Senate Election, Expulsion and Censure Cases from 1789 to 1960, S. Doc. No. 71, 87th Cong., 2d Sess., 144 (1962).

By virtue of Art. I, § 5, Senate custom, and this Court's prior holdings, the Senate has exclusive authority to settle a recount contest once the contestee has been certified and seated, albeit conditionally.

Article I, § 5, provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." To implement this authority, the Senate has established a custom of resolving disagreements over which of two or more candidates in a senatorial race attracted more ballots. The apparent loser may initiate the process by filing with the Senate a petition stating (a) what voting irregularities he suspects, and (b) how many votes were affected. Upon receipt of such a petition, a special committee may be authorized to investigate the charges alleged. If the allegations are not frivolous and would be sufficient, if true, to alter the apparent outcome of the election, actual ballots may be and have been subpoenaed to Washington for recounting by the committee. Also, witnesses may be required to testify. The committee performs the function of deciding both the factual issues and what allegations would be sufficient to warrant favorable action on a petition.

Thus, in the Iowa senatorial campaign of 1924, Smith Brookhart was the apparent winner over Daniel Steck, who filed with the Senate the complaint that illegal votes had been cast for his opponent. The petition was referred to the Subcommittee on Privileges and Elections which was authorized to make a full investigation. It heard testimony and recounted the ballots in Washington. The committee and eventually the Senate agreed that, contrary to earlier assumptions, Steck had won. Accordingly, Brookhart was replaced by Steck as a Senator from Iowa. See *Steck* v. *Brookhart*, Senate Election, Expulsion and Censure Cases from 1789 to 1960, S. Doc. No. 71, 87th Cong., 2d Sess., 116–117 (1962). See also *Hurley* v. *Chavez*, *id.*, at 151 (upon re-

counting, the subcommittee and the Senate found that neither candidate had won and the seat was declared vacant); *Sweeney* v. *Kilgore*, *id.*, at 145 (adjustments for fraudulent campaign tactics were insufficient to reverse official outcome); *O'Conor* v. *Markey*, *id.*, at 144 (recount of all votes cast in 1946 Maryland race revealed too few mistakes to cause reversal in outcome); *Willis* v. *Van Nuys*, *id.*, at 138–139 (petition rejected as insufficient grounds for recount); *Bursum* v. *Bratton*, *id.*, at 114 (recount will not be conducted absent a showing of grounds to doubt the accuracy of official count).

The Senate's procedure is flexible:

> "The Senate has never perfected specific rules for challenging the right of a claimant to serve, inasmuch as each case presents different facts. The practice has been to consider and act upon each case on its own merits, although some general principles have been evolved from the precedents established.
>
> "This practice of viewing each case affecting claims to membership on its individual merits has resulted in a variety of means by which the cases are originated. The Senator-elect to a seat in the Senate generally appears with his credentials. On some occasions, when these credentials are presented, some Senators will submit a motion that the credentials be referred to the Committee on Rules and Administration, and that, pending report, he be denied the privilege of taking the oath of office. Upon adoption of such a motion, the Senator-elect steps aside and the Senate seat is vacant for the time being. Any question or motion arising or made upon the presentation of such credentials is privileged and would be governed by a majority vote.
>
> "On other occasions, the Senator-elect is permitted to take the oath of office, and this is now regarded and

followed as the proper procedure, but thereafter inquiry as to his election is undertaken by the Senate. Resolutions calling for such investigations may be offered by any Senator. In an instance where a newspaper charged a Senator had obtained his office by illegal means, the Senator himself offered a resolution calling for an investigation of the charges.

"The usual origin of such cases, however, is by petition. The contestant may file such a petition, protesting the seating of the contestee, and asserting his own right to the seat in question. It is not required to be filed prior to the swearing-in of the contestee, and no rights are lost if filed afterwards. In some cases, petitions have been signed and filed by others than the contestant, simply protesting against the seating of the contestee, without asserting any claim in behalf of the defeated candidate. Any number of citizens may submit such a petition; and it might make charges of illegal practices in the election, or of the improper use of money, or even of the unfitness of the claimant to serve in the United States Senate.

"A petition of contest is addressed to the U. S. Senate, and may be laid before the Senate by the presiding officer or formally presented by some Senator. There is no prescribed form for such a petition. It is somewhat analogous to a complaint filed in a lawsuit. It customarily sets forth the grounds or charges upon which the contest is based, and in support of which proof is expected to be adduced. The petition is usually referred to the Committee on Rules and Administration, which has jurisdiction over '. . . matters relating to the election of the President, Vice President, or Members of Congress; corrupt practices; contested elections; credentials and qualifications; [and] Federal elections generally . . . .'

> "The Legislative Reorganization Act of 1946 empowers each standing committee of the Senate, including any subcommittee of any such committee, to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures (not in excess of $10,000 for each committee during any Congress) as it deems advisable. Each such committee may make investigations into any matter within its jurisdiction and may report such hearings as may be had by it." S. Doc. No. 71, 87th Cong., 2d Sess., vii–viii (1962).

The parties before the Court are apparently in agreement that, as is true of several other arenas of public decisionmaking, there has been a "textually demonstrable constitutional commitment" (*Baker* v. *Carr*, 369 U. S. 186, 217; *Powell* v. *McCormack*, 395 U. S. 486, 518–549) to the Senate of the decision whether Hartke or Roudebush received more lawful votes. Our case law agrees. Both *Barry* v. *Cunningham*, 279 U. S. 597, and *Reed* v. *County Comm'rs*, 277 U. S. 376, were generated during the disputed 1926 senatorial election in Pennsylvania in which William Vare appeared to have defeated William Wilson. In 1926 a Senate committee was authorized to inquire into the means used to influence the nomination of candidates in that election. The committee asked some local county commissioners to produce certain ballots but were refused, whereupon members of the committee sought a federal court order compelling the ballots' production. On appeal, this Court held that because the Senate had been fully competent to use its own subpoena power to secure the ballots, the District Court had lacked jurisdiction to act only at

the behest of the committee. In the course of discussing the committee's scope of authority the Court said:

> "The resolutions are to be construed having regard to the power possessed and customarily exerted by the Senate. It is the judge of the elections, returns and qualifications of its members. Art. I, § 5. It is fully empowered, and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department. That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections." 277 U. S., at 388.

In *Barry* v. *Cunningham, supra,* the Court upheld the Senate's power under Art. I, § 5, to call witnesses before it in order to determine the factual history of the same controverted 1926 election involved in *Reed.* In answer to the argument that Vare had not been a member of the Senate inasmuch as he was unseated (and therefore the witness was relieved of the duty to answer inquiries) the Court held:

> "It is enough to say . . . that upon the face of the returns [Vare] had been elected and had received a certificate from the Governor of the state to that effect. Upon these returns and with this certificate, he presented himself to the Senate, claiming all the rights of membership. Thereby, the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right immediately attached by virtue of § 5 of Article I of the Constitution." *Barry* v. *Cunningham, supra,* at 614.

And *Cunningham* holds that, "The Senate, having *sole* authority under the Constitution to judge of the elections, returns and qualifications of its members, may exer-

cise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute." *Id.*, at 619 (emphasis added). Judicial interference with this "indubitable power" was said to be possible only upon a clear showing of "such arbitrary and improvident use of the power as will constitute a denial of due process of law." *Id.*, at 620.

Once certification by the Governor has been presented to the Senate, a State may not by conducting a recount alter the outcome of the election—a principle that has been widely recognized by state courts. See *Laxalt* v. *Cannon*, 80 Nev. 588, 397 P. 2d 466, and cases cited therein.

Thus, although the Houses of Congress may not engraft qualifications for membership beyond those already contained in Art. I, *Powell* v. *McCormack*, 395 U. S. 486, where all that is at stake is a determination of which candidates attracted the greater number of lawful ballots, each has supreme authority to resolve such controversies.[1]

Although all agree that in the end the Senate will be the final judge of this seating contest, the nub of the instant case comes down to opposing positions on how important it may be to preserve for the Senate the opportunity to ground its choice in unimpeachable evidence. It is with regard to this phase of the cases that I disagree with the majority.

The Senate may conclude that only a recomputation supervised by it under laboratory conditions could serve as an acceptable guide for decision. Such a recomputation, however, will not be possible once local investigators have exposed these presently sealed ballots to human judgment.

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[1] Several areas of decisionmaking are immune from judicial review by federal courts. The cases are reviewed in *Baker* v. *Carr*, 369 U. S. 186.

Obviously, state officials might desire to preview these presently sealed ballots in order to influence the Senate's deliberations.

Charges or suspicions of inadvertent or intentional alteration, however baseless, will infect the case. No longer will the constitutionally designated tribunal be able to bottom its result on unassailed evidence. Since even a slight adjustment in the tally could dramatically reverse the outcome, the federal interest in preserving the integrity of the evidence is manifest.

What the Senate should do in the merits is not a justiciable controversy. The role of the courts is to protect the Senate's exclusive jurisdiction over the subject matter, as did this Court in *Barry* v. *Cunningham*, *supra*. The Senate's Subcommittee on Privileges and Elections, for example, might subpoena these ballots, thereby precluding, as a practical matter, any local recount. Or the Senate might ask for a local recount. Either course is within the control and discretion of the Senate and is unreviewable by the courts. The District Court had jurisdiction only to protect the Senate's choice,[2] not to make the choice for or on behalf of the Senate.

I would affirm the judgment of the District Court.

[2] Cf. *Ex parte Peru*, 318 U. S. 578.